

FILED  
JAN 5 1961

JAMES T. HODGES, Clerk

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1960

No. 4

INTERNATIONAL ASSOCIATION OF MACHINISTS, *et al.*

*Appellants.*

—v.—

S. B. STREET, *et al.*

*Appellees.*

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

**BRIEF UPON REARGUMENT, FOR APPELLEES, S. B. STREET, NANCY M. LOOPER, HAZEL E. COBB, J. H. DAVIS, MRS. EDNA FRITSCHER, MRS. ELIZABETH FERGUSON, AND OTHERS SIMILARLY SITUATED**

E. SMYTHE GAMBRELL

W. GLEN HARLAN

CHARLES A. MOYE, JR.

TERRY P. MCKENNA

GAMBRELL, HARLAN, RUSSELL, MOYE & RICHARDSON

825 Citizens & Southern

National Bank Building

Atlanta 3, Georgia

December 29, 1960

## TABLE OF CONTENTS

### PAGE

Introductory Statement ..... 1

Summary of Argument ..... 9

### ARGUMENT

I. The record now before this Court establishes clearly that individual appellees' constitutional rights have been violated ..... 18

A. Under Well-Settled Principles of Adjudication, the Judgment for Individual Appellees Must Be Affirmed if Any of the Several Grounds for Relief Is Established 19

B. This Court Is Not Obligated to Declare in Advance Details of the Rules Which May Govern All Future Contingencies ..... 23

C. The Decree Properly Defers Details for Further Hearing in Accordance with Established Equitable Principles ..... 28

D. The Rights of the Individual Appellees Under the First Amendment Are Not Subject to "Balancing" Against Other Interests ..... 31

E. The Claimed "Deficiencies" in the Record Are Wholly Irrelevant to the Constitutional Issues ..... 36

F. Even If the Record Were Deficient for Constitutional Adjudication, the Decree Nevertheless Would Stand Upon Statutory Grounds ..... 43

II. The decree was carefully fashioned and limited to the practical necessities of protecting the constitutional rights infringed .....

A. An Injunction Against Collection Is the Traditional and Practical Remedy Against an Unconstitutional Assertion of Power to Exact Moneys .....

B. The Supposed "Alternative" Remedy Would Be Either Illusory or Identical in Operation With the Decree Entered .....

1. *Mere tracing of the appellees' contributions would be futile* .....

2. *The suggested "alternative" would be the functional equivalent of the decree entered* .....

C. To Compel the Individual Appellees to Bear the Burden of Supervising Future Expenditures Would Finally and Effectively Deny Their Constitutional Rights

D. The Supposed Legislative Remedies Are Unavailable or Inapposite .....O.....

III. The decision below properly declared Section 2, Eleventh, unconstitutional as applied to the appellees under the facts proved .....

A. The State Courts Correctly Held the Statute Unconstitutional, Not on Its Face, But in Its Application Between These Parties

B. The Courts Below Properly Held That the Constitutionality of the Statute as Applied Depends Upon the Purposes for Which Exactions Were Made Under Color of Its Authority .....	68
C. Section 2, Eleventh, Is Unconstitutional to the Extent That It Confers an Unlimited Power to Force Exactions from Railroad Employees .....	73
D. Section 2, Eleventh, Is Unconstitutional to the Extent That It Requires Unwilling Membership in Political or Semi-Political Organizations .....	80
IV. The Solicitor General's analysis of <i>Lathrop v. Donohue</i> supports the lower court's decree in this case .....	83
CONCLUSION .....	84

#### Authorities:

##### Cases:

<i>Adair v. United States</i> , 208 U.S. 161 (1908) .....	82
<i>Amalgamated Workers v. Edison Co.</i> , 309 U.S. 261 (1940) .....	81
<i>Baker v. State</i> , 90 Ga. 153, 15 S.E. 788 (1892) .....	20
<i>Baldwin v. Morgan</i> , 251 F.2d 780 (5th Cir. 1958) .....	72
<i>Barsky v. Board of Regents</i> , 347 U.S. 442 (1956) .....	82
<i>Bates v. Little Rock</i> , 361 U.S. 516 (1960) .....	34, 38
<i>Bourjois, Inc. v. Chapman</i> , 301 U.S. 183 (1937) .....	65
<i>Boynton v. Virginia</i> , 29 U.S.L. Week 4049 (No. 7, December 5, 1960) .....	13, 44

**Brown v. Board of Education**, 347 U.S. 483  
349 U.S. 294 (1955) .....

**Cantwell v. Connecticut**, 310 U.S. 296 (1940)  
**Capitol Greyhound Lines v. Brice**, 339 U.S. 276 (1950) .....

**Carter v. Carter Coal Co.**, 298 U.S. 238 (1936)  
**Clay v. Sun Insurance Office, Limited**, 363 U.S. 491 (1960) .....

**Collins v. New Hampshire**, 171 U.S. 30 (1898) .....

**Davis v. Packard**, 31 U.S. 41, 6 Pet. 312 (1833)  
**Davis v. Wechsler**, 263 U.S. 22 (1923) .....

**Everson v. Board of Education**, 330 U.S. 1 (1947) .....

**The Fair v. Kohler Die & Specialty Co.**, 228 U.S. 229 (1913) .....

**Felter v. Southern Pacific Co.**, 359 U.S. 326 (1959)  
**Foote v. Stanley**, 232 U.S. 494 (1914) .....

**Frasier v. Board of Trustees**, 350 U.S. 979 (1956) .....

**Great Northern Ry. Co. v. Washington**, 300 U.S. 286 (1937) .....

**Greene v. McElroy**, 360 U.S. 474 (1959) .....

**Grosjean v. American Press Co.**, 297 U.S. 233 (1936) .....

**Guffin v. Kelly**, 191 Ga. 880, 14 S.E. 2d 50 (1944) .....

**Hague v. Committee for Industrial Organization**,  
309 U.S. 496 (1939) .....

**Hecht Co. v. Bowles**, 321 U.S. 321 (1944) .....

**Helvering v. Gowran**, 302 U.S. 238 (1937) .....

**Hill v. Florida**, 325 U.S. 538 (1945) .....

**Ingels v. Morf**, 300 U.S. 290 (1937) .....

**International Assn. of Machinists, et al. v.**  
**Street, et al.**, 215 Ga. 27, 108 S.E. 2d 796 (1954) .....

**International Brotherhood v. Denver Milk Pro-**  
**Inc.**, 334 U.S. 809 (1948) .....

3 (1954)	11, 28-30, 38, 54
0)	25
U.S. 542	14, 49
6)	77
U.S. 207	55
898)	79
832)	20
	58
1 (1946)	40
28 U.S. 22	52
6 (1959)	38, 40
	14, 50
(1956)	38
0 U.S. 154	
14, 49-50, 64, 65	44
233 (1936)	25
1941)	20
zation, 307	
10, 24-25, 28, 77	30
	20
	25, 77
	14, 49
v. S. B.	
(1959)	
Producers,	43

International Union v. Wisconsin Employment Relations Board, 336 U.S. 245 (1949)	
Jaffke v. Dunham, 352 U.S. 280 (1957)	
Jones v. Opelika, 319 U.S. 103 (1943)	
Labor Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)	
Lassiter v. Northhampton County Board of Elections, 360 U.S. 45 (1959)	
Lathrop v. Donahue, October Term, 1960, No. 200	
Lawrence v. State Tax Commission, 286 U.S. 276 (1932)	
Lincoln Federal Labor Union v. Northwestern L. & M. Co., 335 U.S. 525 (1949)	
Looper, et al. v. Georgia Southern & Florida Ry. Co., et al., 213 Ga. 279, 99 S.E.2d 101 (1957)	
Lovell v. Griffin, 303 U.S. 444 (1938)	
Marino v. Ragen, 332 U.S. 561 (1947)	
Martin v. Struthers, 319 U.S. 141 (1943)	
McCarroll v. Dixie Greyhound Lines, 309 U.S. 176 (1940)	
Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 (1941)	
Murdock v. Pennsylvania, 319 U.S. 105 (1943)	
N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958)	
Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 24 (1933)	
Nippert v. Richmond, 327 U.S. 416 (1946)	
Pappas v. Stacey, 151 Me. 36, 146 A. 2d 497 (1955)	
Railway Employees' Dept. v. Hanson, 351 U.S. 22 (1956)	5-8, 10, 16, 24, 64, 65, 66, 68
Rescue Army v. Municipal Court, 331 U.S. 549 (1947)	
Reynolds v. United States, 98 U.S. 145 (1878)	

VI

Schechter v. United States, 295 U.S. 495 (1935)

Schneider v. New Jersey, 308 U.S. 147 (1934)

Shelton v. Tucker, 21 U. S. Sup. Ct. Bu.  
(Nos. 14 and 83)

Slochower v. Board of Education, 350 U.S. 551 (1956)

Smith v. Texas, 233 U.S. 630 (1914)

Speiser v. Randall, 357 U.S. 513 (1958)

Staub v. City of Baxley, 355 U.S. 313 (1958)

Takahashi v. Fish and Game Commission,  
410 (1948)

Talley v. California, 362 U.S. 60 (1960)

Terry v. Adams, 345 U.S. 461 (1953)

The Fair v. Kohler Die & Specialty Co., 228  
(1913)

Thornhill v. Alabama, 310 U.S. 88 (1940)

Truax v. Raich, 239 U.S. 33 (1915)

United Public Workers v. Mitchell, 330 U.S. 181 (1948)

United States v. C.I.O., 335 U.S. 106 (1948)

United States v. Classic, 313 U.S. 299 (1942)

United States v. Rumely, 345 U.S. 41 (1953)

United States v. U.A.W.-C.I.O., 352 U.S. 566 (1957)

Watkins v. United States, 354 U.S. 178 (1957)

West Virginia State Board of Education v.  
319 U.S. 624 (1943)

Wieman v. Updegraff, 344 U.S. 183 (1952)

Yick Wo v. Hopkins, 118 U.S. 356 (1886)

### ***U. S. Constitutional Provisions:***

Bill of Rights

First Amendment

Fifth Amendment

Ninth Amendment

5 (1935) .....	17, 75,
	76, 77
7 (1939) .....	25, 77
Bulletin 245	
.....	11, 26-27, 77
S. 551 (1956) .....	81
.....	81
17, 33-34, 58, 75, 76	
1958) .....	64
ion, 334 U.S.	
.....	81
.....	25, 48, 77
.....	17, 77-78, 79
....., 228 U.S. 22	
.....	52
.....	25, 48
.....	81
U.S. 75 (1947) .....	38
1948) .....	53, 59
1941) .....	72
1953) .....	10, 24
567 (1957) .....	53
(1957) .....	81
n v. Barnette,	
.....	13, 36, 41
52) .....	25, 81
86) .....	81
.....	
.....	48, 55, 81
.....	10, 11, 12, 22, 25,
.....	35, 39, 57, 62, 82
.....	12, 22, 57, 82
.....	82

# **U. S. Statutory Provisions:**

Railway Labor Act, Sec. 2, Eleventh .....	16, 37, 42
	63, 65, 66, 67
	71, 72, 73-74
	79
U. S. Code, Title 28, Sec. 2403 .....	

## **Other Authorities:**

Black, <i>The Bill of Rights</i> , 35 N. Y. U. L. Rev. 865	
(1960) .....	3:
Bradley, <i>The Public Stake in Union Power</i> (1959) ..	
Federal Rules of Civil Procedure, Rule 54 (c) .....	
Green, <i>The Right to Communicate</i> , 35 N. Y. U. L.	
Rev. 903 (1960) .....	
Harvard L. Rev., <i>The Supreme Court, 1959 Term</i> , 74	
Harv. L. Rev. 81 (1960) .....	
Lenhoff, <i>The Problem of Compulsory Unionism in</i>	
<i>Europe</i> , 5 Am. J. Comp. L. 18 (1956) .....	
Mathews, <i>Labor Relations and the Law</i> (1953) .....	
Rothschild, <i>Government Regulation of Trade Unions</i>	
<i>in Great Britain</i> , 38 Col. L. Rev. 1335 (1938) .....	
Stokes, <i>Church and State in the United States</i> (1950)	
Teller, <i>British v. American Labor Laws and Prac-</i>	
<i>tices: A Study in Contrasts</i> , ABA Section of Labor	
Relations Law (1957) .....	
Universal Declaration of Human Rights .....	
Virginia Act for Religious Freedom .....	
Whittaker, Address Before Federal Bar Ass'n, 7 Fed.	
Bar News 370 (1960) .....	
Wright, <i>The Impact of the Union</i> (1951) .....	

IN THE  
**Supreme Court of the United**

OCTOBER TERM, 1960

No. 4

---

INTERNATIONAL ASSOCIATION OF MACHINISTS

—v.—

S. B. STREET, *et al.*,

---

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

---

**BRIEF UPON REARGUMENT, FOR APPELLANTS  
STREET, NANCY M. LOOPER, HAZEL E. COOPER,  
DAVIS, MRS. EDNA FRITSCHER, MRS. E. M. FERGUSON,  
AND OTHERS SIMILARLY SITUATED**

---

**Introductory Statement**

Six employees of the Southern Railway System, on behalf of themselves and fellow workers similarly situated, after litigating for seven years in the Courts of Georgia, obtained rulings that laborers, however humble, have the right to their own political opinions and to express them as they see fit, and that labor union compulsory union contracts cannot force the suppression of political thoughts, expressions and financial contributions of the six plaintiffs and other railroad workers.

ject to union shop contracts in this country.<sup>1</sup> The question for decision, upon reargument here, is whether this Court will protect the individual railroad employee from being compelled, through governmental power and at the price of his job, to become a member of a union engaged in political activity and to support legislative programs, political philosophies, and candidates for public office contrary to his convictions and beliefs, or whether judicial redress should be denied and a decision avoided, as the Solicitor General advises.<sup>2</sup>

The constitutional issue is clearly drawn. The appellant unions, as labor organizations established under the Railway Labor Act, obtained recognition as statutory collective bargaining agents for achieving industrial peace and stability on the nation's railroads, pursuant to national policy. In this role they have sought and obtained the compulsive power of the United States Government to force all their fellow workers to join their associations and support financially their efforts to achieve their partisan political and ideological goals.<sup>3</sup> Throughout this proceeding, and indeed

---

<sup>1</sup> *International Assn. of Machinists, et al. v. S. B. Street, et al.*, 215 Ga. 27, 108 S.E. 2d 796 (1959); *Looper, et al. v. Georgia Southern & Florida Ry. Co., et al.*, 213 Ga. 279, 99 S.E.2d 101 (1957).

<sup>2</sup> Upon notification from this Court in accordance with Section 2403 of the Judicial Code (28 U.S.C. § 2403) the United States, acting through the Solicitor General, presented its petition for leave to intervene in this proceeding. Leave being granted, the Solicitor General filed a brief on behalf of the United States, and the appellant unions, on December 15, 1960, filed a brief in response. This brief on behalf of the individual appellees is submitted in response to the briefs of the Solicitor General and of the appellant unions in response, and is supplementary to the main brief filed by individual appellees March 16, 1960.

<sup>3</sup> It is suggested in the opposing briefs that the union shop is not an element of the appellees' case, and that the same questions arise under an open shop (appellant unions' responsive brief, pp. 7-8; Solicitor General's brief, pp. 30-31). The suggestion mis-

at the very bar of this Court, the appellants have admitted their use of money collected from the individual appellees, through the leverage of governmental power, for partisan political purposes.<sup>4</sup> As both lower courts found, as the in-

apprehends the issues. It is one thing to compel a man to pay political tribute to a union *as the price of his livelihood* and as a condition to retaining his long-held job. It is quite another thing to leave him free to join or resign as he chooses, and to contribute or not to contribute, without jeopardizing his job. Whether, without a government-imposed union shop, the employee would be subject to sufficient compulsion or coercion toward membership and political contributions to invoke constitutional guarantees is not the issue in this case. The question here is whether the employee can be forced to *how to money exactions for political purposes in order to keep his job*.

<sup>4</sup>These colloquies occurred in the first oral argument of this case, April 21, 1960:

(Transcript, p. 25) "Mr. Kramer (counsel for appellant unions):

... What happens to the people here? They have to pay \$3.00 a month, some of which gets spent for purposes of which they disapprove. . . .

"Mr. Justice Stewart: In theory of course they are not forced to listen, but to speak. Their money is taken from them, compelled, compulsorily, in order to support speech in which they do not believe.

"Mr. Kramer: That is right.

"Mr. Justice Stewart: And with which they disagree.

"Mr. Kramer: That is right."

(Transcript, p. 26) "Mr. Kramer: A portion of the money, after it is received by the union, is used to support or oppose legislation—to support legislation which they oppose or to oppose legislation which they support.

"Mr. Justice Stewart: Exactly."

(Transcript, pp. 28-29) "Mr. Justice Black: Does it mean these people, in order to hold their jobs, pay money which is to be used to advocate public views which they oppose, or to favor public views which they are against?

"Mr. Kramer: I am not sure I understand what you mean by public views.

"Mr. Justice Black: Let's leave out the word 'public'. Views that have to do with legislation, that have to do with social policies?

"Mr. Kramer: Yes.

dependent evidence now before this Court indisputably establishes, and as the appellant unions have admitted formal stipulation:

"The periodic dues, fees and assessments which plaintiffs, intervening plaintiffs and the class they represent, have been, are and will be required to pay under the terms of the union shop agreement hereinabove referred to, have been, are being, and will be used in substantial part for purposes other than the negotiation, maintenance, and administration of agreements concerning rates of pay, rules and working conditions or wages, hours, terms and other conditions of employment, or the handling of disputes relating to the above but to support ideological and political doctrines and candidates which plaintiffs, intervening plaintiffs, and the class represented by them, were, are, and will be

---

"Mr. Justice Black: That have to do with problems that people are interested in as citizens, and as members of society."

"Mr. Kramer: Yes."

(Transcript, p. 30) "Mr. Justice Brennan: Is there a limit in this case of abusive use of some of these funds to support the candidacies of particular candidates who some of the plaintiffs might oppose?"

"Mr. Kramer: Not by name, no."

(Transcript, p. 31) "Mr. Justice Frankfurter: Is there any point in denying the fact that part of the money, a fraction of the money that the members of this union must contribute in order to become members of the union and therefore to hold their jobs, would be used in support of measures and men that 'X' number of men and machinists would oppose?"

"Mr. Kramer: I think that is so."

(Transcript, p. 75) "Mr. Justice Black: What about subscriptions to LABOR?"

"Mr. Schoene [for the appellant unions]: That comes out of the Educational Fund, and have their origin in—"

"Mr. Justice Black: Dues Fund?"

"Mr. Schoene: Yes, sir."

"Mr. Justice Black: Are you challenging any of the findings?"

"Mr. Schoene: *Oh, not at all*" (italics added).

opposed to and not willing to support voluntarily" (R. 176).<sup>5</sup>

The conduct exposed by this open confession calls for unequivocal condemnation.

In the face of this shocking record, one might have expected the Solicitor General to take it as his sworn duty to uphold the highest law, and to vindicate the constitutional rights of the individual. On the contrary, his brief would have this Court ignore the question that demands decision. He says (brief, p. 49): "In our view, the Court need not and should not determine the constitutionality or legality of the various expenditures and activities which appellees challenge." Offering an escape instead of a remedy, the Solicitor General suggests (brief, p. 17), that it would be "appropriate" for the Court to set aside the relief granted to these laborers by the Courts below and uselessly "to reaffirm the general constitutionality of Section 2, Eleventh, of the Railway Labor Act, and of the union shop agreements made pursuant thereto", in the same terms already used by the Court in *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956).

<sup>5</sup> Appellant unions also declared at page 103 of their main brief dated February 15, 1960:

"On August 14, 1958, a comprehensive stipulation was entered into by all parties. R. 165-205. In said stipulation the *union defendants conceded virtually everything plaintiffs might contend concerning them and their associates and affiliates*" (italics added).

The Solicitor General, at page 8 of his brief filed November 1960, declared:

"The evidence in the voluminous record in this case falls into four distinct categories: (1) the stipulation of facts (R. 165-217); (2) plaintiffs' three requests for admissions and the unions' answers (R. 277-323; Tr. 1049-75); (3) the depositions of officials of political organizations with which the unions are associated (R. 108-152); and (4) various documents and periodicals of the unions tending to show union activities and expenditures in political and legislative affairs. *The pertinent facts are not in dispute*" (italics added).

For nearly eight years, the six railroad laborers who the appellees here have struggled through the state federal courts in quest of protection for their rights, without once questioning that their constitutional guarantees have been openly violated, the Solicitor General would send these hapless workmen back to the lower courts overwhelmed, to begin afresh with an arduous new trial or new suit", or to despair in a contest of attrition. Assuming the role of adviser to this Court, he would simply exonerate the responsibilities of decision and "reaffirm" the decision in the *Hanson* case which he recognizes<sup>6</sup> did not involve issues controlling here.<sup>7</sup>

---

<sup>6</sup> "The union shop agreements in this case are substantially identical with that in *Hanson*. The record in the present case, however, differs from that in *Hanson* primarily in more explicit showing that union dues and fees, some of which are collected under sanction of the union shop agreement, are used in substantial part for legislative and political purposes, and to advance doctrines and ideas of the unions and their officers" (brief, p. 10).

<sup>7</sup> In the *Hanson* case, the same unions were parties with the same attorneys, and the contract was similar, but that case was made before the contract was put into effect; so there was *virtually no evidence or factual record* in the *Hanson* case. It therefore was a supposititious case tried largely on argument and rumor.

(Transcript of argument in *instant* case, p. 6) "Mr. Justice Frankfurter: May I interrupt you to ask this.

"Compared to the *Hanson* case, and the pleadings in the *instant* case, what issues, if any, were tendered in this case that were not before the various courts in the *Hanson* case?"

"Mr. Schoene [for the unions]: I have not, I am not to say, made a detailed comparison of the pleadings in the two cases. I think, however, that this is a substantial response to your question: I do not believe that the *Hanson* case had a specific allegation in the pleadings that monies were expended for political or legislative activities."

(Transcript of argument in *instant* case, p. 69) "Mr. Schoene: \* \* \* It is true that that [*Hanson*] action was brought before the union shop agreement had actually become effective, and consequently an injunction issued in the state courts before there was any opportunity to show that individual persons had been required to join the union."

The remarkable position taken by the Solicitor General is opposed to the basic obligations of the judiciary in a con-

their particular money had been used for any of these purposes."

(Transcript of argument in the *Hanson* case on May 2, 1956, p. 47) "Mr. Justice Black: Have they challenged here that payment of any particular dues for any particular purposes being imposed on them, requiring them to do something they don't want to do?"

"Mr. Nelson [Assistant Attorney General of Nebraska]: No. That it is actually done in this case, I don't think so. Mr. Justice Black; because I think this action was brought before there was an opportunity to even put this contract into operation, at least to any extent. So I doubt if that question could be shown to actually have happened in this case."

(Transcript in *Hanson* case, pp. 60-61) "Mr. Justice Black: The question that I have in my mind is the question that I had before: I do not yet see how this case raises any of those questions where they are in a position in this particular challenge."

"Mr. Schoene: I agree with you, Mr. Justice Black. I don't think those questions are raised at all. I think first you would have to have a specific instance in which the effort has been made to apply to some individual some condition that he finds offensive to his conscience."

(Transcript in *Hanson* case, pp. 59-60) "Mr. Justice Black: \* \* \* Do you construe that as meaning that the man who wants the job can get it, provided he applies to section 4 to this limited extent: he has to do nothing but pay periodic dues, initiation fees, and assessments?"

"Mr. Schoene: I would say he has to do one further thing. Mr. Justice Black, which may not be of any practical significance, but which I think is essential to give meaning to the words 'become a member and maintain membership.' That is to say he has to be consensually willing to join with his fellows in an association. What that means as a practical matter I frankly can't tell."

"Mr. Justice Black: Let me give you another illustration. Suppose you contract to do this, and he had to become a member, he had to be a participant, even though the union was supporting a political party with which he did not agree. Does this relieve him from being compelled to subscribe to such an association as that? If you don't want to say whether it does or does not, is that question raised here?"

stitutional system of government, and reveals its examination to be in conflict with the most fundamen

"Mr. Schoene: I think it is definitely not raised by Justice Black."

*In the face of the above admissions of counsel in argument with the Court, it is difficult to understand how the appellants could have brought themselves to make the statements below:*

(Transcript of argument in instant case, p. 15)  
Kramer: "••• The Hanson case is fully dispositive of the contention raised by the individual Appellees."

• (Transcript of argument in instant case, p. 16)  
Schoene: It is our position—and the sole point that we want to argue—that every issue in this case was disposed of by this Court's opinion and decision in the *Hanson* case.

(Main brief of appellant unions, p. 19) "All the facts in this case were present in the *Hanson* case and the same arguments were made."

(Main brief of appellant unions, p. 26) "Both the Nebraska and U. S. Supreme Courts [in *Hanson*] assumed that the Railway Labor Act authorized union shop agreements and that fees and dues were used in part for legislative and administrative purposes."

(Main brief of appellant unions, p. 35) "Since none of the findings of the trial court and none of the evidence in this case in any material respect from the findings and evidence in the Nebraska case, we respectfully urge that the decision of the Court in the *Hanson* case is dispositive here and that reversal of the decision below."

(Main brief of appellant unions, p. 37) "The briefs filed by Robert L. Hanson, *et al.* in this Court in *Ry. Employees' Dept. v. Hanson*, 351 U.S. 225, made all the contentions of the plaintiffs here urged upon the court below."

(Main brief of appellant unions, p. 38) "... it is clear that this Court in the *Hanson* case had before it for decision the precise issue decided by the court below."

(Amicus Curiae brief of AFL-CIO, pp. 4-5) "The transcript of Record before this Court in *Hanson* clearly shows that union dues were used for political purposes."

"In the face of such evidence, this Court unanimously rejected the constitutional attacks upon the validity of the Railway Labor Act, the Railway Labor Act, the Railway Labor Act, 2, Eleventh and the union shop agreement identical to the one here challenged."

itself upon  
amental and

sed here, Mr.

l in colloquy  
w the unions  
ments quoted

p. 13) "Mr.  
itive of every

p. 6) "Mr.  
that I intend  
isposed of by  
a case."

All the basic  
case, and the

"Both courts  
amed that the  
ments although  
and political

ce none of the  
nce differed in  
vidence in the  
ecision of this  
and requires a

he briefs filed  
Ry. Employes'  
entions which

it is evident  
it for decision

) "The Tran-  
clearly showed  
es. . . .

t unanimously  
dity of section  
tical to the one

firmlly established principles observed by this Court in t  
discharge of its constitutional functions.

The brief of the Solicitor General attempts to off  
three purported excuses for avoiding decision: First, t  
record made by the parties is said to be inadequate; Secor  
the remedy afforded by the decree is said to be improv  
in view of a supposed alternative remedy; and Third, t  
court below is said to have erred in declaring the statu  
and the contract "itself" to be void.

### Summary of Argument

I. The record in this case is exceptionally large, t  
proof is uncontradicted, and this litigation has already c  
tended for nearly eight years. Yet the Solicitor Gener  
suggests that it is "inadvisable" for the Court to deci  
the case on this record because, apparently, he feels th  
the individual appellees have proved too wide a range  
political activity by the appellant unions, and they ther  
fore should be forced to undergo further extended a  
costly litigation in order to obtain fine judicial distinctio  
between the great varieties of political and ideologic  
expenditures which appellant unions make with mone  
forcibly extracted from appellees, thus infringing appelle  
constitutional rights.

I A. The Solicitor General erroneously assumes that t  
courts must make all possible distinctions and decide  
possible issues—actual or hypothetical—before they c  
decide even the most fundamental constitutional iss  
Such assumption overlooks the basic principles (1) th  
individual appellees (as plaintiffs) are entitled to prev  
if they can show invasion of their constitutional rights  
any one of several particulars; (2) that the courts co  
not properly give advisory opinions as to all potential

tivities and expenditures of appellant unions and possible variations and combinations of such activities and expenditures; and (3) that the parties have met in a direct conflict on fundamental issues, with the slightest suggestion of collusion, and are entitled to a decision on the issues thus presented.

I B. It would be highly irregular for the Court to participate and decide supposititious detailed constitutional issues in advance of the necessity for decision. See *Employees' Dept. v. Hanson*, 351 U. S. 225 (1956); *States v. Rumely*, 345 U. S. 41 (1953). This Court has condemned efforts, such as that urged by the Solicitor General, to declare in advance a detailed code of constitutional conduct when the necessary and requested relief is an injunction against unconstitutional conduct. Thus, in *NLRB v. Committee for Industrial Organization*, 307 U. S. 276 (1939), the lower courts sought to specify the conditions under which defendants could act without infringing the constitutional rights of plaintiffs. This Court reversed, saying (307 U. S. at 518):

"The decree attempts to formulate conditions under which respondents and their sympathizers may distribute such literature free of interference. We think the decree goes too far. All respondents are entitled to is a decree declaring the ordinance unconstitutional and enjoining the petitioners from enforcing it."

In many other situations this Court has enjoined governmental action which invaded First Amendment rights without attempting to define, or require the lower courts to define, the boundaries within which action could be taken constitutionally. As recently as December 12, 1960, the Court approved an injunction against enforcement of a statute which infringed "associational freedom" even though the Court evidently believed that if the statute were

and the pos-  
activities and  
met head on  
without the  
ed to a deer

courts to an-  
constitutional  
See *Railway*  
(1956); *United*  
court has con-  
itor General,  
stitutional con-  
is simply an  
thus, in *Hague*  
307 U. S. 496  
the conditions  
infringing the  
urt reversed,

ditions under  
ers may dis-  
ence. . . . We  
spondents are  
rdinance void  
forcing it."

joined govern-  
nt rights with-  
r courts to de-  
d be taken con-  
1960, this Court  
t of a statute  
en though the  
vere more nar-

rowly drawn it would be constitutional. *Shelton v. T*  
21 U. S. Sup. Ct. Bulletin 245 (Nos. 14 and 83). So in  
instant case the Court should condemn the uncon-  
stitutional conduct complained of, and should not defer  
thus deny) justice by requiring preliminary decisions  
hypothetical, speculative and unnecessary questions.

I C. The trial court followed the traditional and free  
equity practice of granting an injunction against un-  
conduct while inviting appellant unions to obtain mod-  
tion of the injunction by showing that their improper  
activities have ceased. The court thus followed the ex-  
of this Court in *Brown v. Board of Education*, 347  
483 (1954), and 349 U. S. 294 (1955), where this Court  
declared "the fundamental principle" that racial seg-  
regation in public schools is unconstitutional, but left for  
disposition the details of compliance in individual  
tions. Here, as in the *Brown* case, the burden of present-  
a plan of compliance was properly placed on defend-  
(appellant unions), who are in the best position to  
and advise the trial court of the possible methods  
will protect individual appellees while having the least  
verse effect on the internal affairs of the unions.

I D. The Solicitor General suggests that the Court  
should "balance" the constitutional rights of appellants  
freedom of thought, speech and association against the  
interests of the "majority" in enforcing the union  
This assumes that First Amendment rights must some-  
yield to the desire of the "majority" to compel the  
"minority" to support financially the "majority's" political  
and ideological programs which the "minority" opposes.  
This Court has held squarely that there is no constitu-  
tional right to force others to join a union in order to keep  
jobs. *Lincoln Federal Labor Union v. Northwestern Iron*  
*Co.*, 335 U.S. 525, 537 (1949). *A fortiori* there is no

stitutional right to force contribution to the political activities as the price of continued employment there can be no "balancing" of the constitutional freedom of speech, belief, association and property against "interests" which have no constitutional basis. Moreover, there is eminent authority for the proposition that the First Amendment rights are not subject to "balancing" against *any* conflicting interests, but only against any governmental interference, of any kind, without regard to the purported justification for the impairment. Clearly there can be no such "balancing" in the case at bar.

I E. The Solicitor General suggests that the evidence is "deficient" for constitutional adjudication, but the constitutional evidence sought by him is plainly irrelevant and immaterial in view of the fundamental issues here. The Solicitor General's asking for the absolute numbers of persons (1) who were forced to join the Communist Party in order to keep their jobs, and (2) who objected to the use of their funds for political and ideological purposes, and (3) the absolute and relative amounts (stipulated to be "substantial") of dues moneys used for political purposes—all this pre-supposes that the constitutional rights of the appellees may be subject to the doctrine of *de minimis*, a position which is contrary to the very basis of the constitutional position, as explained by James Madison nearly a century ago (I Stokes, *Church and State in the United States* 391):

"Who does not see that . . . the same argument can force a citizen to contribute 3 pence to the support of property for the support of any one religion as may force him to conform to any other religion in all cases whatsoever."

Moreover, the fourth "deficiency" suggested by the Solicitor General—a supposed lack of evidence of "

the unions' political employment. Surely constitutional rights of political action on a constitutional basis. the proposition subject to "balancing" in

that the record is not, but the additional and irrelevant facts are here presented. Absolute and relative to join the unions object to the use of funds for political purposes, and (stipulated to be constitutional rights of appeal *de minimis*, a basis of our Constitution nearly 200 years *United States*, 387,

the authority which depends only of his one establishment, other establishment

supported by the Solicitor General of "the feasibility

of segregating" funds so that "dissenters'" contributions would not be used for political purposes—is predicted by the Solicitor General's proposal for a tedious preliminary determination by the trial court of all possible (actual and hypothetical) issues before justice is done. Such a procedure would be erroneous. Any allocation of funds should be considered only if and when the appellant unions present a plan of compliance which incorporates such allocation and demonstrate that it is administratively practicable. Allocation of funds between types of political activities suggested by the Solicitor General, would be contrary to the Court's holding in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), that "neither the State, nor any political, high or petty, can prescribe what shall be uttered in politics, nationalism, religion, or other matters or require any person to confess by word or act the faith therein."

I F. The record is entirely adequate for constitutional adjudication. But even if it were not, and even if the Court were to avoid the constitutional issues for some reason suggested by the Solicitor General, there is no reason for avoiding decision as to the validity of the activities complained of. The Solicitor General says that the Labor Act does not authorize improper expenditure of funds, but if that were so, the Court should grant an injunction on statutory grounds, even though the issue has been presented on constitutional grounds. See *Boyd v. United States*, 29 U.S.L. Week 4049 (No. 7, December 1943), where the Court took such action. None of the reasons advanced by the Solicitor General for reluctance in making constitutional determinations can be applied to a case where the Court is asked to declare that collection of funds for political use is not authorized by statute.

II. Due deference for the independence of the judiciary and for the chancellor's discretion requires that the decree be affirmed without regard to procedure so long as the substance of federal rights is preserved. *Nashville, C. & St. L. Ry. v. Wallace*, 289 U.S. 285 (1933) and cases cited.

II A. The decree in fact is entirely proper in view of the practical necessities of the case. The proper remedy is to enjoin the collection of money in excess of that asserted by the demanding agency exceeds legal bounds, even though part or all of the money could be lawfully collected under a different law. *McCarroll v. Dixie Greyhound Lines*, 309 U.S. 339 (1940); *Ingels v. Morf*, 300 U.S. 290 (1937); appended opinion of Mr. Justice Frankfurter in *Case v. W. B. Egan & Co. Lines v. Brice*, 339 U.S. 542, 561 (1950); *United States v. Belmont*, 327 U.S. 416 (1946). Where, as here, the funds are mingled and part has been used for unlawful purposes, an injunction is proper to prevent the further dissipation of funds until the collector can show that the funds will be used only for lawful purposes. *Foot v. United States*, 250 U.S. 494 (1914); *Great Northern Ry. Co. v. United States*, 300 U.S. 154 (1937). Here, the appellant unrefutedly stated that funds forcibly exacted from appellants were for purposes unrelated and unnecessary to the public interest; gaining; and they arrogantly assert that they have a restricted right to use such funds for any purpose. Under these circumstances the injunction against the use of the funds is not only appropriate, but is the only relief which could be granted.

II B. The Solicitor General has suggested that in support in precedent, that "alternative" remedy should have been pursued by appellees. These remedies

ence of the state's  
 tion requires that  
 procedural details  
 ights is protected.  
 288 U.S. 249, 261

proper and suited  
 e. The traditional  
 ey where the power  
 ceeds constitutional  
 e money demanded  
 rent claim of power.  
 09 U.S. 176 (1940);  
 pendix to dissenting  
*Capitol Greyhound*  
 ); *Nippert v. Rich-*  
 ere, funds are com-  
 lawful purposes, an  
 urther collection of  
 he disputed amounts  
*Foot v. Stanley*, 232

*Co. v. Washington*,  
 at unions have stipu-  
 a appellees are used  
 ry to collective bar-  
 at they have the un-  
 r any such purpose.  
 on against collection  
 t is the only effective

uggested, without any  
 ve" remedies should  
 remedies assume an

allocation of funds between political and non-po-  
 poses and between various types of political p  
 that appellees would have the option to prohibit  
 their contributions for certain political programs  
 possibilities should be considered only after t  
 unlawful expenditures are enjoined and appell  
 have presented a plan of compliance incorporat  
 proposals to protect the constitutional rights of  
 Justice is defeated by judicial avoidance of ine  
 fundamental issues where litigation thus becom  
 ably long and expensive. Mere tracing of app  
 tributions would be futile, since appellant un  
 frustrate appellees' rights by bookkeeping entr  
 any effective protection for appellees necessaril  
 the functional equivalent of the lower court's de

II C. The Solicitor General's suggested "a  
 would place on individual appellees the impossib  
 and expensive burden of policing the political an  
 ing practices of appellant unions, thus imposing i  
 procedural obstacles, which would, in practical  
 stroy their rights.

II D. The Solicitor General suggests that fut  
 tion may cure the constitutional infirmities of the  
 contract as presently administered. Clearly this  
 not deny redress for flagrant violation of co  
 rights merely because the legislative branch of  
 ment could, or might some day, remedy the situ  
 Court should, and regularly does, declare bas  
 tional rights and provide protection for such rig  
 waiting for Congress to act. Legislative precede  
 land are inapposite since England has no w  
 stitution and since the union shop is not a subje  
 tive bargaining and is not legally enforceable the

III A. Contrary to the Solicitor General's contentions, the trial court properly declared Section 2, Eleventh, unconstitutional *under the facts of this case*. The *Hanson* decision, which held the statute constitutional *on its face*, reserved decision as to validity of the statute if facts such as are of record here were presented. Appellees' constitutional rights have been infringed under cover of that statutory provision, and to the extent that the statute is so applied it must be declared unconstitutional. Only the statute authorizes the forcible exaction of appellees' monies which have been and are being used for unconstitutional purposes. Therefore, the lower courts properly declared the statutory provision unconstitutional under the facts of this case.

III B. The Solicitor General, by admitting that "delicate constitutional issues" are presented by this case and that injunctive relief against unconstitutional expenditures is available to appellees (though the Solicitor General proposes a different and frustrating method of obtaining such relief), necessarily concedes that the union shop contract and its administration under the facts of this case constitute governmental action and that, contrary to his own principal contention, the statute, the contract and the expenditures under it are a unit and must stand or fall together. The Solicitor General evidently believes that some of the expenditures under attack are unconstitutional. Appellants directly and boldly assert that Congress intended to authorize the expenditures here complained of. Appellants agree with appellees that the constitutional issues are adequately presented by the record in this case. Thus, a composite of the briefs of the Solicitor General and of appellants supports the view of appellees that Congress is responsible for the expenditures complained of and that the constitutionality of the statute,

the union shop contract and expenditures under the contract are squarely and properly presented for decision by this Court in this case.

III C. The Solicitor General contends that the union shop amendment of the Railway Labor Act is saved from unconstitutionality by an "implied" prohibition against unconstitutional use of the funds forcibly exacted from appellees by Congressional authority. That contention is plainly unsound as it would eliminate the need for constitutional review of all or substantially all legislation which comes before this Court. Congress cannot disclaim responsibility for the natural consequences of conduct which it authorizes and promotes in pursuance of a governmental objective. Congress must establish standards which will protect private constitutional rights against misuse of the power it delegates or otherwise confers. *Schechter v. United States*, 295 U.S. 495 (1935); cf. *Speiser v. Randall*, 357 U.S. 513 (1958). Governmental responsibility for conduct which impairs constitutional rights cannot be avoided by permitting "a private organization" to engage in such conduct. *Terry v. Adams*, 345 U.S. 461 (1953). Government cannot give blanket authority to the unions and then deny responsibility for the misuse of that authority.

IV. The "integrated bar" case is to be distinguished from this case on many factual and legal grounds, including (1) the highly significant fact that there the court provides a continuing supervision over the expenditure of funds, thus affording the protection omitted by Congress and otherwise unavailable under the union shop contract, and (2) the integrated bar is a governmental organization whereas the appellant unions are essentially private associations chosen to serve in a governmental regulatory program.

## ARGUMENT

### I.

**The record now before this Court establishes clearly that individual appellees' constitutional rights have been violated.**

The brief filed by the Solicitor General begins with a short résumé of the undisputed evidence of record in the proceeding. With a few glaring exceptions, that statement of facts constitutes a fair, objective, and accurate outline of the meticulous, detailed evidence, occupying more than a thousand "pages" (many of such "pages" consisting of voluminous documents, newspapers, magazines, etc.), introduced before and considered by the trial court. Even that superficial summary requires a full twelve pages of the Solicitor General's brief. Yet he has suggested that somehow it is "inadvisable" to accept the concrete, uncontradicted evidence, and the findings based upon it. The principal reason assigned for this unusual suggestion is apparently, that the appellees have proved too wide a range of political activity by the unions and have thus supported the allegations of their petition too fully and too well.\*

---

\* Appellant unions (responsive brief, p. 6) agree with individual appellees that the record is adequate for all purposes of this case, pointing out that the record is "exceptionally large," "by far the largest ever filed" in the court below, and that further proceedings "are hardly likely to cast any additional light on any of the issues. . . ."

And the Solicitor General, in his brief, says (p. 19): "In the present case, the record shows that a substantial part of the dues and fees to be collected from appellees will be expended for disputed legislative and political purposes."

(p. 23) "*A. The disputed political and legislative expenditures cover a broad spectrum of activities, and at least some of them raise delicate constitutional issues.*" (Footnote continued)

**A. Under Well-Settled Principles of Adjudication, the Judgment for Individual Appellees Must Be Affirmed if Any of the Several Grounds for Relief Is Established.**

It appears that the Solicitor General based his suggestion that the Court at this time avoid passing on the constitutional question on the success of the appellees in proving that their constitutional rights were invaded by a variety of means and methods. These methods (described in the Solicitor General's brief at pp. 25-28) range from direct contributions to the campaign funds of candidates for public office to propaganda expenditures of the same types as are commonly made by candidates themselves, and to the maintenance of registered legislative lobbyists to oppose or support action on diverse issues affecting not only the union members as employees, but also the general public.<sup>9</sup> Upon the assumption that "at least in some instances" (p. 28) the appellees' constitutional rights must be "balanced" against some other supposed interests,<sup>10</sup> the Solicitor General says that the various devices of political action "may well involve differing considera-

---

(p. 28) "... the issues raised by the parties are of great constitutional importance, ..."

(p. 51) "... the case presents a spectrum of constitutional problems."

<sup>9</sup> A comprehensive analysis of the uncontradicted evidence of record before this Court conclusively establishing these various devices for channeling appellees' dues and fees into political and ideological uses will be found at pages 9a-32a in the appendix of our main brief, and in Parts I and II of that brief we submit to the Court the precedents and authorities establishing that such conduct infringes rights guaranteed appellees by the Bill of Rights.

The complete original transcript of record (including virtually all of the evidence presented to the trial court) has been certified to this Court by the Supreme Court of Georgia and is on file in the office of the Clerk of this Court.

<sup>10</sup> The lack of foundation for this assumption of "balancing" is discussed below in section I D, at pages 31-36 of this brief.

tions" (brief, p. 18). It seems to follow, in his view, that this Court ought to decide those secondary issues before it can decide the fundamental issue presented by the record in this case. Even if that misconception were accepted, the record now before the Court nevertheless would be fully adequate for the task. Each pattern of activity has been proved in detail.

But of course the Solicitor General's premise is wrong. We have here but a single, integrated mechanism (Stipulation, paragraph 20, R. 176), with numerous parts, designed to achieve the common purpose, the support of all employees of the appellants' political and ideological goals regardless of the unwillingness of the employees to support such goals.

However, accepting momentarily for purposes of argument the Solicitor General's view of the evidence, it is clear that if the judgment under review rests upon several grounds which the trial court finds to be established, it may be affirmed if any one of those grounds is sufficient to support the judgment. *Baker v. State*, 90 Ga. 153, 15 S.E. (1892); *Guffin v. Kelly*, 191 Ga. 880, 890, 14 S. E. 2d (1941); *Davis v. Packard*, 31 U.S. 41, 6 Pet. 312 (1833); *Helvering v. Gowran*, 302 U.S. 238 (1937); *Jaffke v. Dham*, 352 U.S. 280 (1957). Even if, contrary to fact, the record were considered inadequate in some undetermined respect relating to one or more of the appellant unions' variegated political activities, the case would still stand for decision by this Court upon those multiple wrongdoings adequately supported by the record now before this Court.

The brief of the Solicitor General is devoid of any identification of the supposed variable considerations that might differentiate the assorted political and ideological expenditures made by the appellant unions. No hint is offered in his brief of any relevant evidence<sup>11</sup> which might have been

<sup>11</sup> See Section I E, pages 36-43 below.

introduced but is not contained in the full and detailed record now before the Court. His misgivings seem to flow rather from the fact that neither the parties nor the courts below have felt compelled to draw fine distinctions among the various expenditures.

As to the parties, the Solicitor General's discontent appears to be based upon the fact that the individual appellees and the appellant unions are too much in disagreement. The unions boldly and absolutely take the stand that they may use funds collected through government compulsion for *any* political or ideological purpose they choose, subject only to applicable statutory restrictions, and recognizing no limits in the Constitution.<sup>22</sup> The individual appel-

---

<sup>22</sup> This is emphasized in the following quotations:

(Main brief of appellant unions, p. 19) "Section 2, Eleventh intentionally imposes no limitation on the purposes for which dues collected under a union-shop agreement may be spent."

(Main brief of appellant unions, p. 26) "The construction that Section 2, Eleventh of the Railway Labor Act places no limitations upon the uses which may be made of dues and fees collected under union shop agreements is in accord with Congressional intent."

(Main brief of appellant unions, pp. 19-20) "• • • an employee has no constitutional right to work for a specific employer without having his dues used in part for political or legislative purposes with which he disagrees."

(Main brief of appellant unions, p. 27) "There is no condition or limitation based upon the use to which the labor organization puts the fees, dues, and assessments. Congress, when it was holding hearings on and debating the Union Shop Amendment to the Railway Labor Act, repeatedly had urged upon it the argument that it was unfair to require an employee as a condition of employment to pay dues and fees which are used for political, legislative, or insurance arrangements with which the employee is in disagreement."

(Main brief of appellant unions, p. 29) "In view of the foregoing, it is plain that Congress was aware of the arguments with respect to use of fees and dues collected through union shop agreements and deliberately refrained from imposing any restriction on

lees take the firm position that to compel them to with the fruits of their labors, political candidatures, and policies which they oppose constitute a fringement of their rights secured by the First and Second Amendments, no matter what subterfuge is resorted to.

the use of such funds for purposes to which an employer would be opposed."

(Main brief of appellant unions, pp. 30-31) "Since this case has been pending, an effort has been made in Congress to secure enactment of legislation giving the plaintiffs what they have sought in this case. In rejecting such legislation Congress made it plain that it was opposed as a matter of course to enabling employees to interfere with the unions in the use of dues, and assessments for any lawful purpose for which the unions may expend its funds."

(Main brief of appellant unions, p. 61) "Political activity is the expansion of legislative activity beyond mere business and labor issues for railroad unions have been the necessary consequences of effective legislative activity and the type of employment relationship which the agreed upon legislation has established."

(Appellant unions' response, p. 2) "Congress Committed That the Unions Would Make Such Expenditures and Three Times Has Refused to Restrict Them or to Give the Unions Members Protection Against Them."

(Appellant unions' response, p. 4) "Plainly it was the policy of Congress that these unions engage in these activities and Congress has refused to restrict them while permitting a union shop to exist. There can be no escape from the conclusion that when Congress adopted the policy of permitting railroad unions to negotiate union agreements, that policy was to permit such agreements to be functioning as they had been functioning for many years. That the permission was not conditioned upon the unions making radical and impractical revisions in the way they operate."

(Appellant unions' response, p. 5) "But the nature of the union activities to which a dissident union member would be opposed is not relevant to the constitutionality of the law. Subject to a union shop and being required to pay dues, it can be held that his employment can constitutionally be conditioned on his paying dues part of which is spent for any purpose which the union opposes."

(Main brief of AFL-CIO, AS AMICUS CURIAE, p. 10) "To determine the proper objects of this 'labor state' or 'labor state' is to determine the proper objects of this 'labor state' or 'labor state'."

to support,  
dates, pro-  
utes an in-  
t and Fifth  
sorted to in

employee might

the present  
Congress to  
ffs the relief  
islation Con-  
of policy to  
e use of fees,  
ich the unions

l activity and  
e bread and  
ecessary conse-  
of regulation  
egislation has

Contemplated  
and at Least  
Give Dissident

was known to  
and Congress  
n shop. There  
gress adopted  
ate union-shop  
ents by unions  
any years and  
nions adopting  
erate."

ure or variety  
member may  
% of his being  
ay, dues, once  
be conditioned  
ny purpose he

E, p. 12) "To  
or specialized

the disposition of the funds and no matter what guise the financial support may take. The parties have thus met head on in a direct conflict of views.

The Solicitor General's suggested solution, if espoused would reward the appellant unions in proportion to the arrogance of their position. Had they conceded, as does the Solicitor General, that some of their admitted activities raise serious constitutional questions,<sup>13</sup> and concentrated their arguments upon an attempt to resolve them, the Solicitor General apparently would not have proposed that this Court avoid the issue. Since they boldly refuse to concede any constitutional qualification whatever to their power over the dues and fees paid by appellees, the Solicitor General advises the Court that the appellants should escape judicial scrutiny of their actions.

**B. This Court Is Not Obligated to Declare in Advance Details of the Rules Which May Govern All Future Contingencies.**

The Solicitor General seems to suppose that no decision can be rendered in this case unless every possible political

government instrumentality which we are now assuming a union is, and to determine what means may reasonably be selected to attain those objects, one must look to the needs of laboring men.

(Main brief of AFL-CIO, AS AMICUS CURIAE, p. 2) "The court below held, inter alia, that the use of union funds for the promotion of political programs opposed by the appellees, where such funds are collected by virtue of union shop agreements permitted under section 2, Eleventh, of the Railway Labor Act, violate appellees' rights under the First and Fifth Amendments to the Constitution of the United States (R. 249-250). This brief will concentrate on these startling constitutional propositions."

<sup>13</sup>The Solicitor General observes (brief, p. 22): "At the same time we believe that the unions do have a responsibility toward dissenting members in taking 'political' action."

He continues (brief, p. 23): "The disputed political and legislative expenditures cover a broad spectrum of activities, and at least some of them raise delicate constitutional issues."

use to which the appellants might put the money collected is considered and its legality or illegality. But no rule is more firmly established or so observed in the work of the Court than that when a decision of constitutional questions unnecessary to the disposition of the case. *Railway Employees' Dept.*, 351 U.S. 225 (1956), is only one of the many decisions applying the principle. See the cases collected in *States v. Rumely*, 345 U.S. 41 (1953). In obedience to a command, this Court may not, and the court below may not, issue a catalog of political activities and expenditures in the past, present, and prospective, with a condescending blessing for each.<sup>14</sup>

Precisely because the court below did not incline to a supposititious tabulation, and because this Court without the aid of that court's advisory opinion, in giving its own, the Solicitor General says that the court should set aside the decree and leave the appellants to seek relief. The very device suggested by the Solicitor General, however, has been condemned by this Court. The coming charged to the court below is the failure to set aside each separate form of political action, and to prohibit the advance of those expenditures which may be made for such action which may not. In short, the court below, it should have formulated a comprehensive code of rules for the financial affairs of the appellant unions, and to detail the conditions under which they may collect and expend moneys of dissenting employees. In *Hague v. Board of Industrial Organization*, 307 U.S. 496 (1939), the court undertook to pursue such a course. In granting an injunction against unlawful governmental action

---

<sup>14</sup> Of course, we do not concede that any political action conditionally can be made of appellees' dues and fees without their consent.

moneys they  
ality declared.  
scrupulously  
which forbids  
ary to the dis-  
pt. v. Hanson,  
y decisions ap-  
ted in *United*  
edience to this  
rt below could  
expenditures,  
ndemnation or

include such a  
Court would be  
ion in prepar-  
at this Court  
ellees without  
icitor General.  
t. The short-  
are to consider  
to specify in  
ade and those  
it is claimed,  
ode to govern  
s, declaring in  
collect and use  
v. *Committee*  
1939), the lower  
n granting an  
tion, it sought

cal use constitu-  
s without their

to specify the conditions under which the defendants  
act without infringing the plaintiffs' First Amend-  
rights. This Court reversed, holding the decree imp-  
(307 U.S. at 518):

"The decree attempts to formulate the conditions  
which respondents and their sympathizers may  
tribute such literature free of interference. . .  
think the decree goes too far. All respondents  
entitled to is a decree declaring the ordinance  
and enjoining the petitioners from enforcing it.

" . . . Although the court below held the ordi-  
void, the decree enjoins the petitioners as to the m-  
in which they shall administer it. There is an  
command that the petitioners shall not place  
previous restraint' upon the respondents in re-  
of holding meetings provided they apply for a p-  
as required by the ordinance. This is followed  
enumeration of the conditions under which a p-  
may be granted or denied. We think this is w-  
As the ordinance is void, the respondents are en-  
to a decree so declaring and an injunction again-  
enforcement by the petitioners."

In numerous other situations where governmental  
has exceeded constitutional bounds and has thus imp-  
First Amendment rights, this Court has declared su-  
tion unconstitutional without attempting to define,  
quire the lower courts to define, the precise limits v-  
which action could be taken constitutionally. See, f-  
ample, *Grosjean v. American Press Co.*, 297 U.S. 233 (1-  
*Lovell v. Griffin*, 303 U.S. 444 (1938); *Schneider v.*  
*Jersey*, 308 U.S. 147 (1939); *Thornhill v. Alabama*  
U.S. 88 (1940); *Cantwell v. Connecticut*, 310 U.S.  
(1940); *Murdock v. Pennsylvania*, 319 U.S. 105 (1-  
*Martin v. Struthers*, 319 U.S. 141 (1943); *Jones v. Op-*  
319 U.S. 103, (1943); *Hill v. Florida*, 325 U.S. 538 (1-  
*Wieman v. Updegraff*, 344 U.S. 183 (1952); *Talley v.*  
*ornia*, 362 U.S. 60 (1960). In each of these cases

others which could be cited, this Court announced applicable basic constitutional principles, established general guidelines to distinguish between constitutional and unconstitutional action, and stated in effect that no statute, ordinance or other governmental action could be narrowed to comply with the Constitution. In *Shelton*, the Court granted immediate, direct and affirmative relief to those affected by the sweepingly unlawful governmental action. In no case did the Court withhold relief from a lower court determined in all conceivable detail to have acted covered by the governmental action could be restrained.

Most recently, this Court followed the same course in approving injunctions against governmental action which impinged on constitutional rights, even though the Court recognized that the statute, if more narrowly construed and applied, would be constitutional. In *Shelton*, 354 U. S. Sup. Ct. Bulletin 245, 252-253, 254 (1957), 83, December 12, 1960) the Court stated as follows:

"The question to be decided here is not whether the State of Arkansas can ask certain of its teachers to disclose all their organizational relationships. It is not whether the State can ask all of its teachers about their associational ties. It is not whether the State can be asked how many organizations they belong to, or how much time they spend in organizational activities. The question is whether the State can ask each of its teachers to disclose every single organization with which he has been associated over the past ten-year period. The scope of the inquiry required is completely unlimited.

• • • • •

"In a series of decisions this Court has held that even though the governmental purpose be important and substantial, that purpose cannot be achieved by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.

• • • • •

ounced the ap-  
established very  
constitutional  
effect that the  
action must be

In each case  
firmative relief  
l governmental  
relief until the  
tails what con-  
uld be lawfully

ame procedure,  
al action which  
ough the Court  
wly drawn and  
ton v. Tucker,  
4 (Nos. 14 and  
follows:

ot whether the  
s teachers about  
t is not whether  
about certain of  
er teachers can  
y belong to, or  
ational activity.  
n ask every one  
gle organization  
ver a five-year  
nired by Act 10

t has held that  
se be legitimate  
be pursued by  
personal liberties  
chieved.

"As recently as last Term we held invalid  
nance prohibiting the distribution of handbills  
the breadth of its application went far beyon  
was necessary to achieve a legitimate govern  
purpose. *Talley v. California*, 362 U.S. 60.  
case the Court noted that it had been 'urged  
ordinance is aimed at providing a way to identi  
responsible for fraud, false advertising and li  
the ordinance is in no manner so limited . . . T  
we do not pass on the validity of an ordinance  
to prevent these or any other supposed evi  
ordinance simply bars all handbills under all  
stances anywhere that do not have the nar  
addresses printed on them in the place the o  
requires.' 362 U.S. at 64.

"The unlimited and indiscriminate sweep of  
ute now before us brings it within the ban of o  
cases. The statute's comprehensive interference  
associational freedom goes far beyond what m  
justified in the exercise of the State's legitimate  
into the fitness and competency of its teachers

The dissenting Justices did not object to the a  
the majority on the ground that there was any s  
duty on the part of the trial court to separate all cor  
lawful restraints from unlawful ones and enjoin  
latter. The dissents were based on the ground  
statute should not be enjoined until it was de  
that it actually infringed the rights of some A  
teacher.

Here it has been established beyond doubt  
rights of the individual appellees have been imp  
a result of governmental action. Therefore, in l  
the principle established in the *Shelton* case, an  
numerous other cases cited above, the unconst  
governmental action was properly enjoined by  
court, and there is no necessity for a preliminary  
definition of the precise line of demarcation betw  
ful and unlawful restraints.

\*Certainly this Court is not deprived of the clear-cut, concrete dispute presented in this case because the court below has faithfully observed the judicial power as set out in the *Hague* authorities, and has not undertaken to dispute the validity of hypothetical, speculative, and uncertain conditions.

**C. The Decree Properly Defers Details for Further Hearing in Accordance with Established Equitable Principles.**

As demonstrated in the immediately preceding this brief, the trial court acted in accordance with judicial precedents in enjoining the conduct of unions which infringes the constitutional rights of the appellees. However, the court retained jurisdiction to modify or even vacate the injunction upon a showing that it would be appropriate (R. 106).

In so declaring and protecting basic rights, retaining jurisdiction to consider subsequent proposals for modification, the trial court also acted in accordance with constitutional equity principles, often applied to injunctive commands.

A conspicuous example of such a preliminary decision of constitutional rights accompanied by a decision on details is *Brown v. Board of Education*, 347 U.S. 483 (1954), and 349 U.S. 294 (1955).

In the *Brown* case, the Court was presented with a constitutional claim made, as here, on behalf of persons similarly situated. The defendants took a flat position, like that taken by the appellants in this case, that their action in segregating public schools according to race infringed no constitutional

of power to decide  
 and in this case be-  
 served the limits of  
 case and other  
 dispose of a multi-  
 unnecessary ques-

preceding section of  
 dance with the best  
 duct of appellant  
 onal rights of ap-  
 isdiction to modify  
 showing that such

rights while re-  
 quent detailed pro-  
 also followed tradi-  
 to soften injunc-

liminary declaration  
 by a deferment of  
 of Education, 347  
 6).

esented with a con-  
 ehalf of a class of  
 tants there took the  
 appellant unions here,  
 e school pupils ac-  
 onal rights.

In the face of the bald claim of power by the de-  
 this Court limited the first phase of the litigation  
 declaring the fundamental principle." 349 U.S. at  
 tails were left for later disposition.

In the *Brown* case, this Court was not preven-  
 declaring the basic constitutional principle by  
 that varying considerations might affect its ap-  
 Not every refusal to enroll a Negro child with v-  
 dents would offend the Constitution, as the Cou-  
 nized. Considerations of geography and the loc-  
 the child's residence, of the physical capacities  
 educational facilities, of the intellectual attainm-  
 aptitudes of the pupil, and of the necessities of or-  
 systematic transition, all might enter into the de-  
 to lawfulness of a particular action by the loc-  
 authorities. By the same token, even if it were  
 the Solicitor General argues, that varying consi-  
 may affect the legality of differing activities, t-  
 below and this Court are not deprived of power t-  
 the fundamental rights. As this Court observe  
 first opinion in the *Brown* case (347 U.S. at 495)

"Because these are class actions, because of  
 applicability of this decision, and because of  
 variety of local conditions, the formulation o-  
 in these cases presents problems of consider-  
 plexity. On reargument, the consideration o-  
 priate relief was necessarily subordinated to  
 mary question—the constitutionality of segre-  
 public education. We have now announced  
 segregation is a denial of the equal protecti-  
 laws."

After declaring the basic constitutional princip-  
*Brown* case, this Court placed the responsibility  
 defendants, the local school boards, for devising  
 senting a plan of compliance (349 U.S. at 299):

"School authorities have the primary responsibility for elucidating, assessing, and solving these problems: courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles."

In the instant case, the courts below have followed this Court's precedent, by first declaring the basic constitutional rights (and also protecting those rights in a manner not immediately feasible in the *Brown* case) and then imposing upon the appellant unions the responsibility, in the first instance, of devising and presenting a plan of operation that will implement and protect those rights. To the degree the Constitution permits, the appellants should be permitted to govern their own affairs, to arrange for the handling of financial resources in the manner most convenient to union structure and operations, and to decide through what channels their funds should be disbursed in the exercise of proper powers. No more effective means could be devised to reconcile the interests of the appellant unions with the rights of the individual employees than to leave the primary responsibility for the solution in its details with the organizations themselves.

"The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public and private interest and private needs as well as between competing private claims." *Hecht Co. v. Bowles*, 321 U.S. 321, at 329 (1944). *D.*

Under the circumstances of this case, as in the *Brown* proceedings, no other means of working out the details of the decree would be feasible or in accord with the practicalities of the situation. A schoolboy can hardly be ex-

pected to present a plan for the revised operation of the public school system. A reluctant union member, forced to join against his will, cannot, consistently with the commands of a court of conscience, be burdened with the duty to devise a reorganization of the complex financial structure of the appellant unions. If equity is to be done, the appellants must come forward with the plan, as the court below has decreed, in accordance with this Court's guidance.

**D. The Rights of the Individual Appellees Under the First Amendment Are Not Subject to "Balancing" Against Other Interests.**

The Solicitor General's brief suggests that each of the various means by which the appellant unions have devoted the dues and fees paid by the individual appellees to candidates and policies they oppose should have been separately considered by the parties in their arguments and by the court below upon the assumption that the determination of the individual's right not to be compelled to support beliefs or programs which he opposes is to be weighed against "conflicting interests". The Solicitor General seems to believe that the sacred rights of thought and belief and expression may sometimes win and sometimes lose in contest with these conflicting interests (Solicitor General's brief, pp. 28-29).

The brief does not make clear what these "conflicting interests" might be. Certainly they are not the interests of the public for, as this Court repeatedly has declared, the interest of the public, in an enduring and vital society, is in the free and untrammelled exercise of First Amendment rights. See Green, *The Right to Communicate*, 35 N.Y.U.L. Rev. 903, at 903-904 (1960).<sup>15</sup> Nor is there conflict with

<sup>15</sup> " . . . Furthermore, in the area of free speech the interests of the particular individual are not weighed against those of the state; rather, the interest of the community at large in 'free trade

any supposed interest in the preservation of industrial peace, or with the interest of union members who subscribe to their leaders' views in collective political activity. Despite the intimations to the contrary (Solicitor General's brief, pp. 28-29), the decree entered below does not in any way impede the appellant unions from carrying out their legitimate responsibilities in the field of collective bargaining, nor does it limit in any respect the power of willing members to make *voluntary* contributions, in concert if they wish, to support their favored political candidates or programs. The only interest that could be regarded as "conflicting" would be an interest of some union members to support their own political beliefs with funds contributed by other employees who disagree with them. On any assumed scale of interests, one man's desire to compel others to support his beliefs can hardly weigh heavily.

A more fundamental defect in the argument is the facile assumption that the individual's right not to affirm or support a political party or program which he opposes is subject to any "balancing" at all. That assumption recently has been commented upon by Mr. Justice Black, *The Bill of Rights*, 35 N.Y.U.L. Rev. 865, 874-875, 878-879 (1960) who declared:

"To my way of thinking, at least, the history and language of the Constitution and the Bill of Rights which I have discussed with you, make it plain that one of the primary purposes of the Constitution with its amendments was to withdraw from the Government all power to act in certain areas—whatever the scope

---

in ideas' is one side of the balance. Therefore, unlike, for example, a statute depriving a defendant of his right to a fair trial, an ordinance abridging freedom of discussion inevitably presents generalized issues not set against the background of the facts of a particular case. As a consequence, there is less danger that 'premature' determination will in the end prove to be ill-advised. Note, *The Supreme Court, 1959 Term*, 74 Harv. L. Rev. 81, 130-131 (November 1960).

of those areas may be. If I am right in this then there is, at least in those areas, no justification whatever for 'balancing' a particular right against some expressly granted power of Congress. If the Constitution withdraws from Government all power over subject matter in an area, such as religion, speech, press, assembly, and petition, there is nothing over which authority may be exerted."

. . . . .

"It seems to me that the 'balancing' approach also disregards all of the unique features of our Constitution which I described earlier. In reality this approach returns us to the state of legislative supremacy which existed in England and which the Framers were so determined to change once and for all. On the one hand, it denies the judiciary its constitutional power to measure acts of Congress by the standards set down in the Bill of Rights. On the other hand, though apparently reducing judicial powers by saying that acts of Congress may be held unconstitutional only when they are found to have no rational legislative basis, this approach really gives the Court, along with Congress, a greater power, that of overriding the plain commands of the Bill of Rights on a finding of weighty public interest. In effect, it changes the direction of our form of government from a government of limited powers to a government in which Congress may do anything that Courts believe to be 'reasonable'."

Similar views are found in numerous opinions of this Court and the members thereof. For example, in *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943), the majority of the Court stated: "Freedom of press, freedom of speech, freedom of religion are in a preferred position." In *Speiser v. Randall*, 357 U.S. 513, 530, 531 (1958), the concurring opinion states:

"We should never forget that the freedoms secured by that Amendment—Speech, Press, Religion, Petition and Assembly—are absolutely indispensable for the preservation of a free society in which government is

based upon the consent of an informed citizenry and dedicated to the protection of the rights of all, even the most despised minorities."

... As stated in prior cases, I believe 'that the First Amendment grants an absolute right to believe in a governmental system, [to] discuss all governmental affairs, and [to] argue for desired changes in the existing order.'

Again in the concurring opinion in *Bates v. Little Rock*, 361 U.S. 516, 528 (1960), it is stated:

"Moreover, we believe, as we indicated in *United States v. Rumely*, 345 U.S. 41, 48; at page 56 (concurring opinion), that First Amendment rights are beyond abridgment either by legislation that directly restrains their exercise or by suppression or impairment through harassment, humiliation, or exposure by government. One of those rights, freedom of assembly, includes of course freedom of association; and is entitled to no less protection than any other First Amendment right. . . ."

Clearly rights such as these cannot be "balanced" against mere "interests" which have no constitutional basis. That the "interests" of the unions which the Solicitor General seeks to "balance" against the constitutional rights of the appellees are not entitled to constitutional protection was established by this Court in *Lincoln Federal Labor Union v. Northwestern I. & M. Co.*, 335 U.S. 525 (1949), in response to an argument by the unions that state right-to-work laws were unconstitutional because they deprived union workers of a claimed constitutional right to force others to join the union or give up their jobs. This Court said (335 U.S. 531):

"We deem it unnecessary to elaborate the numerous reasons for our rejection of this contention of appellants. Nor need we appraise or analyze with particularity the rather startling ideas suggested to support

some of the premises on which appellants' conclusions rest. *There cannot be wrung from a constitutional right of workers to assemble to discuss improvement of their own working standards, a further constitutional right to drive from remunerative employment all other persons who will not or can not participate in union assemblies.* The constitutional right of workers to assemble, to discuss and formulate plans for furthering their own self interest in jobs cannot be construed as a constitutional guarantee that none shall get and hold jobs except those who will join in the assembly or will agree to abide by the assembly's plans. For where conduct affects the interests of other individuals and the general public, the legality of that conduct must be measured by whether the conduct conforms to valid law, even though the conduct is engaged in pursuant to plans of an assembly" (italics added).

If, as was thus settled in *Lincoln Union*, union employees do not have a constitutional right to force others to join the union, *a fortiori* they have no right to force others to contribute to the union's political activities as the price of continued employment. The force of *Lincoln Union* and its necessary implications appear to have escaped the Solicitor General.

Whatever the power of government to silence speech which does affirmative harm, as obscenity or advocacy of forcible overthrow of the government, there is no interest that "conflicts" with the right of the individual (as here) to remain silent, to decline to affirm or manifest support for any prescribed orthodoxy or majority view.<sup>16</sup>

<sup>16</sup> The appellant unions, attempting avoidance of the First Amendment, state (responsive brief, p. 7):

"Nothing that the union publishes or espouses or otherwise supports prevents any dissident member from doing anything, while, on the other hand, restricting the majority in engaging in such activities might well infringe their First Amendment

In this area, the concept of "balancing" can have no proper application. To refuse any decision upon individual appellees' claims so that further litigation, could bear the expense of it, would bring each separate expenditure sharply into focus" for "balancing" against appellees' right not to support the political views of (Solicitor General's brief, pp. 47., 29) would be a and fatuous mockery.

**E. The Claimed "Deficiencies" in the Record Are Wholly Irrelevant to the Constitutional Issues.**

The Solicitor General suggests only four related questions upon which it is claimed the record be "deficient" for constitutional adjudication.\* First it is that (brief, p. 14) there is a deficiency in that the

---

rights. See *United States v. C.I.O.*, 335 U.S. 106, 120. The individual dissident is as free as before to read, wants, to think what he wants, to listen to what he wants, say what he wants, etc.; the only requirement of the shop is that he contribute to the funds of the union, get spent as a majority wishes within such limitations. Congress sees fit to and may constitutionally impose.

The fact that one of Jehovah's Witnesses, required to only a moment each school day in saluting the United States (against his religious convictions); was free for many other of each day during which to salute another flag of his choice, no flag at all, did not mitigate the wrong inflicted upon him. *Virginia State Board of Education v. Barnette*, 319 U.S. (1943). The fact that a Moslem is generally free to worship at the altar of his own religion would not remove or mitigate constitutional objection to our government's requiring worship one minute of each day in the Christian faith. Congress has no power to modify the plain commands of the First Amendment in respect to religion or belief. It is bravado for the unions, in relation to union shop practices (responsive brief, p. 7): "... restricting the majority in such activities might well infringe their First Amendment rights." When once the unions won the union shop contract, accepted a governmental stewardship and thereafter were to conform to the restrictions of the First Amendment precisely as if they were the government itself.

have no  
in the in-  
on, if they  
arate "ex-  
against the  
of others.  
a useless

ed factual  
below is  
it is said  
the "record

120-2, 139.  
read what he  
he wants, to  
f the union  
union which  
mitations as  
pose."

ed to spend  
l States flag  
other hours  
his choice or  
n him. *West*  
U.S. 624, 633  
o worship at  
mitigate the  
ring him to  
faith. And  
ands of the

It is sheer  
ctices, to say  
in engaging  
Amendment  
contract, they  
were bound  
nent as pre-

does not reveal the number of employees of the railroad who voluntarily joined appellant unions or the number" who were required to join under the union shop agreement. Such a suggestion implies that human beings may be subject to the doctrine of *de minimis*, and that the rights of the individual alone, or of a relatively small minority, may be ignored if the opposing majority is large enough.<sup>17</sup> The assumption is at war with the whole conception of constitutional government, and would make of the Bill of Rights a travesty. So long as one man is willing to stand up for his rights, it matters not a whit how many of his fellows are willing to be enslaved. The six appellees now before this Court are six times enough to invoke the full panoply of constitutional power in support of their individual rights, whether there be a single other employee who shares their determination to vindicate the integrity and the dignity of the individual. And the Stipulation shows (Paragraphs 5 and 6; R. 166) that a substantial number of the affected employees were required to join the union again.

<sup>17</sup> Because of the total irrelevancy of the precise ratio of diversity of belief among the membership of the appellant unions, the arguments and the briefs, both in this Court and below, have used the terms "majority" and "minority" somewhat loosely to characterize the dominant forces in the union on the one hand and the individual members who disagree with union orthodoxy on the other. No evidence in the record indicates whether this so-called "minority" comprises 51% of the membership, or only the union officers and leaders in control for the time being without regard to the rank-and-file. The statements in the Solicitor General's brief to the effect that approximately 75% to 80% of railroad employees were voluntary union members (brief, pp. 14, 35) are based solely on an unsupported estimate made before a Congressional committee, and do not constitute evidence in any sense. Moreover, the estimate does not even purport to indicate how many union members are willing to contribute funds for political use. It should be noted, in addition, that since the enactment of Section 2, Eleventh, and the execution of union shop agreements, all members are forced to remain such, and none can fairly be called "voluntary".

their will and other substantial numbers lost their employment—all because of the union shop contract.<sup>18</sup>

The same absolute lack of relevance characterizes the second “deficiency” claimed by the Solicitor General (brief, p. 14), that the record shows only that the number of employees who object to the unions’ use of dues for political purposes is “substantial”, and does not provide a precise count or reveal the craft or classification of those they belong or the states in which they reside. If these facts<sup>2</sup> could possibly enter into the determination of the constitutional issue is not explained. It cannot be supposed that whether an employee is a clerk or a craftsman or resides in Virginia or Georgia will affect the protection afforded by the First Amendment.<sup>19</sup> Such a claim is completely without relevance to any question presented in the case.

As the third supposed “deficiency” in the record, the Solicitor General suggests (brief, p. 14) that t

---

<sup>18</sup> No question has been raised as to the capacity of the named appellees to represent other employees of the Railway System who were unwilling to join the appellants voluntarily and who object to political use of their dues and assessments. The Solicitor General does not suggest otherwise (brief, p. 13). The courts below found specifically that the action was proper and the representation adequate (R. 263-64). The appellants have stipulated to the same (R. 166-67). (See *Bates v. Little Rock*, 361 U.S. 516, at 523, n. 1. As this Court demonstrated in *Brown v. Board of Education*, 347 U.S. 483 (1954); 349 U.S. 294 (1955), there is no need for a poll of all persons similarly situated before the issue in a class suit may be decided. The precise number cannot be determined, if necessary, in subsequent proceedings brought by members of the class. See *Felter v. Southern Pacific Co.*, 326 F.2d at 329-30 (1959); *Frasier v. Board of Trustees*, 331 F.2d (1956), affirming *per curiam* 134 F. Supp. 589 at 593 (1955). In any event, one plaintiff is enough. *United Workers v. Mitchell*, 330 U.S. 75 (1947).

<sup>19</sup> See pages 46-63 of our main brief for discussion of the fact that the union shop contract involves governmental action apart from individual state right-to-work laws.

their employ-

acterizes the  
neral (brief,  
mber of em-  
s funds for  
not state the  
ion to which  
How these  
ation of the  
be seriously  
or a signal-  
fect the pro-  
uch facts are  
presented in

record, the  
at there is a

city of the six  
f the Southern  
ppellant unions  
their dues, fees,  
uggest otherwise  
y that the class  
e (R. 101, 249,  
same effect (R.  
523, n. 9 (1960).  
*Education*, 347  
need to conduct  
issues presented  
er can be deter-  
ought by other  
*fic Co.*, 359 U.S.  
es, 350 U.S. 979  
593 (M.D.N.C.  
*United Public*

ession of the fact-  
ntal action even

"lack of evidence concerning the proportion of appellant general dues funds used for legislative and political purposes" beyond the undisputed evidence that the amount is "substantial". What relevance a precise percentage for or a sum accurate to the penny would have is not suggested. If the appellant unions use seventy percent or fifty percent or twenty percent, the constitutional question is not altered. To require the individual appellees to conduct a detailed audit with cost-accounting procedures in order to entitle them to a decision upon their rights is hardly consistent with the traditions of a court of equity. The court found specifically that the appellants had so mingled funds that contributions of the appellees could not be traced in detail. If any penalty is to be visited for lack of detailed evidence on the question, if it is relevant at all, it is the appellant unions, with ready means of access to the information, who should be burdened, and who should be subjected to a presumption against them.

The suggestion of the Solicitor General is inconsistent with the historic origins of the First Amendment. In 1786, conservative members of Virginia's General Assembly introduced a bill providing for a tax for the maintenance of religion. I Stokes, *Church and State in the United States* 387 (1950). The opponents of this measure were led by James Madison, whose "Memorial and Remonstrance Against Religious Assessments" is one of the great documents in the struggle for freedom of conscience. Its masterful summary of objections brought about, in October, 1786, the defeat of the bill against which it was directed. I Stokes *supra*, at 391. Among other things, Madison, in this "monstrance", said:

"Who does not see that . . . the same authority which can force a citizen to contribute 3 pence of his property for the support of any one establishment, may force him to conform to any other

lishment in all cases whatsoever." I St  
at 391.

The enduring principle so declared was later in Jefferson's Virginia Act for Religious Freedom provided the moving force for the adoption of the First Amendment. This history is authoritative on the meaning and purpose of that Amendment. *Reynolds v. U.S.*, 98 U.S. 145, 163-64 (1878); *Everson v. Board of Education*, 330 U.S. 1 (1946). In sum, the first purpose of the First Amendment is to forbid exactions, however petty, that would propagate ideas contrary to the individual's conscience.

Fourth and finally, the Solicitor General's brief (brief, p. 14), of the lack of evidence of "the effect of segregating the dues and fees of individual appellants from other dissenters, so that their money would not be used for political and legislative purposes—*assuming, of course, that such segregation was necessary or desirable*" (added). The appended assumption belies the sufficiency of the evidence. If the matter warrants investigation, it can be considered by the trial court upon the appellants' submission of a plan of compliance, under part I C above. Inconvenience in bookkeeping is not in any view outweigh constitutional rights. The feasibility of such segregation cannot be viewed in light of the appellees' claim. In any event, the burden of proof on such an issue must rest with the appellants, and their failure to meet it is no reason for reversing the judgment. The individual appellees by reversing the judgment the appellants arrogantly have said that they need

<sup>20</sup> The Act, preserved as Section 57-1, Virginia Code, declares "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and tyrannical . . ."

<sup>21</sup> *Cf. Fetter v. Southern Pacific Co.*, 359 U.S. 32

Stokes, *supra*.  
 ter perpetuated  
 Freedom,<sup>20</sup> and  
 on of the First  
 on the meaning  
 . *United States*,  
 d of Education,  
 use of the First  
 petty, to propa-  
 ience and belief.  
 eral complains  
 he feasibility of  
 l appellees, and  
 not be used for  
 g, of course, that  
 irable" (italics  
 ne supposed "de-  
 ration, the ques-  
 on the appellant  
 ce, as discussed  
 ookkeeping could  
 rights," so the  
 rieved as critical  
 burden of going  
 th the appellant  
 ason for penaliz-  
 the decree. The  
 need account to  
 ginia Code (1950).  
 tributions of money  
 isbelieves, is sinful  
 S. 326 (1959)..

no one for a single penny of the funds exacted from  
 vidual appellees which have been expended for po-  
 purposes.

While, as this Court held in *Railway Employees' D-*  
*Hatston, supra*, an employee can constitutionally be  
 pelled not only to accept a union as his collective barg-  
 agent (when it has been chosen by a majority of l-  
 workers) but also can be forced to bear his share  
 proper expenses incurred in the course of that barg-  
 there is a wide gulf separating collective bargaining  
 political activity. The Solicitor General and app-  
 span that gulf too easily with an assumption that po-  
 activity which might be thought by some to be in the  
 est of employees is therefore within the realm of col-  
 bargaining.

That assumption is invalid. A union, it is true,  
 pursue an objective such as unemployment compen-  
 either through bargaining with employers or through  
 ment of legislation. Yet, while these may be means  
 proximately the same end, they are very different and  
 to bear very different considerations—all of which ar-  
 ent in the case at bar. For a union to bargain for  
 with his employer is one thing. For it to determine  
 is best for him politically is quite another thing. To  
 tain the latter, the Court would have to turn its back  
 solemn pronouncement, in *West Virginia State Bo-*  
*Education v. Barnette*, 319 U.S. 624, 642 (1943), th-

"If there is any fixed star in our constitutional  
 stellation, it is that *no official, high or petty, can*  
*scribe what shall be orthodox in politics, nation-*  
*religion or other matters of opinion or force c-*  
*to confess by word or act their faith therein.* If  
 are any circumstances which permit an exception  
 do not now occur to us" (italics added).

With respect to political activities by the union, the Solicitor General states (brief, p. 26), "the question of dispute apparently revolves primarily around the publication of periodicals and their contents."

This simply is not true, as reference to the record demonstrates. At the national level, appellants use ways other than in periodicals to support or oppose legislation, support or oppose candidates for office, and support the national committee of one political party. (See, with respect to the National Executives' Association, Stipulation, paragraph 28, and with respect to Railway Labor's Political Action Committee, Stipulation, paragraphs 28-42, all at R. 18.)

There is good reason to doubt whether the Solicitor General believes very strongly that a line should be drawn dividing valid and invalid political activities. The distinction between activities by a union from regular dues and fees exacted from members under a union shop agreement authorized by the National Labor Relations Act, Eleventh. Thus, on page 31, for example, he states that "the considerations *may well* apply to the question of expenditures and activities" of appellants. On page 32, he states that the various kinds of activities and expenditures "*probably* should be placed in one basket for analytical or constitutional purposes" (italics added). Page 33 of his brief contains equivocal expressions—"may involve different considerations . . . may conflict with . . . may be met with different treatment . . . may be subject to different treatment . . . constitutional treatment different from . . ." Summarizing on page 34, the Solicitor General states that "the question of the legality of these various union activities *may well turn on* differing and *perhaps* different considerations" (italics added).

If, however, the record *were* inadequate in this respect, the proper course would not be

the national unions, 26), that "the area ly around the pub- ts."

o the record quickly pellant in diverse t or oppose federal s for political office, one major national the Railway Labor paragraphs 25-27, Political League, 182-187).

r the Solicitor Gen- e should be drawn ities when financed exacted from mem- orized by Section 2, e, he says that "dif- the various classes ants (*italics added*). kinds of union ac- ould not be treated tutional purposes" f is replete with different considera- e more difficult . . . . . might be given . . . . . " And, sum- eral says that "the union expenditures ps conflicting con-

te in some material be the action the

Solicitor General has suggested to the Court. In an sional case, where the claim was premature and abstract as to cast doubt on the existence of a justiciab troversy, this Court has found the record inadequate constitutional decision. See, *e.g.*, *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947). But the critical consequence such a conclusion has been entirely overlooked by the tor General. In such a case, the appropriate action f Court is *dismissal of the appeal*. The Court thus d to exercise the judicial power, and leaves the parties the state court has placed them. The decision be neither affirmed nor reversed. Such a disposition is pletely different from the course which the Solicitor eral now advises. He does not suggest that this should decline to exercise its powers; on the contra proposes that the Court should employ the most radic disruptive power it possesses—the authority to s naught the solemn decision of the highest court of a Words cannot be wrenched to equate reversal with a to exercise judicial power. To reverse is to decide, clearest, most unmistakable form. To ask the Court verse the decision in the guise of declining to act is vite this Court to dissemble. If the Solicitor General correct in his characterization of the record, the r would be the dismissal of the appeal.<sup>22</sup>

**F. Even If the Record Were Deficient for Constitutional Adjudication, the Decree Nevertheless Would Stand Upon Statutory Grounds.**

The record below is more than sufficient to warra judication of all issues presented and argued. Eye

<sup>22</sup> The disposition in *International Brotherhood v. Denver Producers, Inc.*, 334 U.S. 809 (1948), serves to illustrate the tice. The opinion states: "PER CURIAM: Because of the quacy of the record, we decline to decide the constitutional involved. *The appeal is dismissed . . .*" (*italics added*).

were deficient in some respects, however (as it clearly is not), reversal would not be called for. The detailed pleadings, the mass of evidence introduced, and the detailed findings of the trial judge offer a sound foundation for decision of the question as a matter of statutory interpretation, aside from constitutionality. The principles upon which the Solicitor General relies to excuse decision of constitutional questions can have no application when the question involves the construction of an act of the legislature. See, e.g., *Greene v. McElroy*, 360 U.S. 474, 492-493 (1959). The Solicitor General has argued (brief, pp. 19-20, 38-39) that Section 2, Eleventh, of the Railway Labor Act does not authorize the expenditures here in issue, but on the contrary impliedly prohibits them. As appears elsewhere in this brief, we disagree with the Solicitor General in this respect, but even if that argument were sound, the decree should be affirmed by this Court since the result is correct, despite the ground assigned for it in the court below. See cases cited page 20 above.

In *Boynton v. Virginia*, 29 U.S.L. Week 4049 (No. 7, December 5, 1960), the Court made its decision on statutory grounds although the case was decided below and argued in this Court on constitutional grounds. See also *Greene v. McElroy*, 360 U.S. 474 (1959).

## II.

**The decree was carefully fashioned and limited to the practical necessities of protecting the constitutional rights infringed.**

The decree entered by the court below was fully and painstakingly considered and precisely tailored to the needs of the case. No different injunction could have been framed to safeguard the constitutional rights of all concerned.

Due respect for the rightful independence of the judiciary of the state in a federal system necessarily affords a wide latitude to the states and their courts in the field of remedies. Whether the relief given should follow the historic patterns of the courts of law or the courts of chancery is a matter for the state to decide, and is not a federal concern. In reviewing the decrees of the inferior federal courts, this Court properly exercises a general supervisory power over the administration of justice in the federal judicial system, but it has no such supervisory power over the administration of justice in the courts of the several states. When a state court decree comes before this Court, the question is not whether it would have entered the same decree, or even whether the decree is so ineptly drawn as to be erroneous and to constitute an abuse of discretion. The sole question is whether the state court, in exercising its independent power to select the form of relief believed to be appropriate has violated federal rights through the guise of its remedial procedures. *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287, 296 (1941): "But we do not have revisory power over state practice, provided such practice is not used to evade constitutional guarantees."

The possibilities that a federal court might not have given the same remedy in the exercise of equitable powers, or

might have found the case not ripe for decision, or might have required the plaintiffs to submit a different prayer for relief,<sup>23</sup> are beside the point when the case has come from the courts of a state. All three possibilities were argued in *Nashville, C. & St. L. Ry. v. Wallace*, 288 U.S. 249 (1933), and all three were rejected. There the complaint and evidence before the state court would not have warranted equity relief in a federal court. The remedy given by the state court could not have been given by a federal court, since the judgment was merely declaratory, and the federal declaratory judgments act had not then been enacted. The prayer for relief there was inadequate and improper by federal standards. Yet this Court affirmed. Mr. Justice Stone, writing for a unanimous Court, declared the principles which refute the Solicitor General's arguments here (288 U.S. at 264):

---

<sup>23</sup> The Solicitor General's brief repeatedly suggests that the appellees must lose because their pleading did not conclude with "proper request for relief" and because of "the remedy sought and the theory of appellees' suit" (brief, pp. 22, 32). This anachronistic reversion to the rigidity of the forms of action has no place in equity procedures, and is at war with the moving spirit behind the Rules of Civil Procedure promulgated by this Court. More particularly, the argument violates the letter of Rule 54(c), which provides:

"... every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, *even if the party has not demanded such relief in his pleadings*" (italics added).

The Solicitor General would advise this Court to forbid the state to reform their procedures, and deny to Georgia the right to follow practices as liberal as this Court has prescribed for the United States District Courts. Moreover, the Solicitor General's argument wholly overlooks the fact that the relief requested was not narrowly limited to a prayer for a single and specified injunction. The appellees asked explicitly for "all other and further necessary relief to adequately protect their rights" (R. 14, 83-84). The trial court, under Georgia law, therefore had full power to award any relief to which the evidence might have shown the appellees to be entitled.

"Whenever the judicial power is invoked to review a judgment of a state court, the ultimate constitutional purpose is the protection, by the exercise of the judicial function, of rights arising under the Constitution and laws of the United States. The states are left free to regulate their own judicial procedure."

This Court's reviewing function concerning the form and scope of the decree is limited, too, by the traditional deference paid by an appellate court to the chancellor's discretion in framing an injunction. Having heard and weighed the evidence, the trial judge is especially well qualified to determine the precise limits of relief necessary to protect the prevailing party without undue interference with the defendant. Only if it appears that this discretion has been abused may the higher court inject its judgment. *Milk Wagon Drivers Union v. Meadowmoor Dairies, supra.*

The decree entered by the trial court contains a single functional prohibition. The appellant unions are prohibited from discharging the individual appellees for failure to pay dues, fees, or assessments imposed by the appellant unions. The prohibition is immediately coupled with an offer to the appellants to dissolve the injunction upon a requisite showing. In its effect, therefore, the decree resembles a preliminary injunction, to remain effective until further proceedings have run their course. The decree, by its terms, will last only until the appellant unions have made a showing that they will no longer conduct their operations so as to invade the constitutional rights of unwilling members (R. 106). For reasons apparent from the nature of the parties, any relief more limited or restricted would have failed utterly to protect the constitutional rights at stake.

**A. An Injunction Against Collection Is the Traditional and Practical Remedy Against an Unconstitutional Assertion of Power to Exact Moneys.**

In his brief, the Solicitor General seems to suggest the carefully drawn decree of the trial court should be altered because it is thought to be too broad. "It is difficult to understand," he says (brief, p. 40), "why the proper expenditure of a part of general dues funds should invalidate the entire agreement, [and] excuse appeal from paying any part of the fees, dues and assessments called for by the agreement. . . ." It is submitted that it is not difficult to understand the necessity for this result if one will but examine the practice of this Court in dealing with similar questions.

The Solicitor General's argument seems to assume that the individual appellees should have determined, by some undisclosed means, precisely how much the appellant union might legally have demanded to defray the proper cost of collective bargaining. But the appellant unions have taken and persist in taking the arrogant position that they may collect and spend dues, fees, and assessments under any union shop agreement for *any* political purpose they choose, without limit or qualification. In the face of this position, the individual appellees should not be compelled to bear the burden of amending the unions' policies to bring them within the confines of the Bill of Rights. It is not incumbent upon the individual, subjected to an asserted power which transcends constitutional limits, to prove precisely how far the governmental power might have been extended if the policy had been revised and changed. "does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute . . . ." *Thornhill v. Alabama*, 310 U.S. 88, at 98 (1940). See *Talley v. California*, 362 U.S. 60 (1960).

In the realm of money exactions, the traditional remedy, both in this Court and elsewhere, has been to enjoin the collection *in toto* if the power asserted by the demanding agency exceeds constitutional bounds. It has never been thought relevant that some portion of the exaction properly might have been made, or indeed that an equal amount legally might have been collected, had a different power been asserted as the basis. Thus this Court has held in a lengthy line of cases that a state tax may be enjoined in whole, and no part of it may be collected, if the imposition is based upon an assertion of a power to levy a tax on the privilege of engaging in interstate commerce. See, *e.g.*, *McCarroll v. Dixie Greyhound Lines*, 309 U.S. 176 (1940); *Ingels v. Morf*, 300 U.S. 290 (1937); the cases tabulated in the appendix to Mr. Justice Frankfurter's dissenting opinion in *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, at 561 (1950); and *Nippert v. Richmond*, 327 U.S. 416 (1946). The flat injunction against collection is not rendered erroneous by reason of the fact that the same amount properly might have been collected if a different basis for the exaction had been asserted.

In *Great Northern Ry. v. Washington*, 300 U.S. 154 (1937), the state was constitutionally entitled to collect the reasonable cost of supervision and regulation from railroads engaged in interstate commerce. In seeking to enjoin the collection of license fees ostensibly levied for this purpose, the complaining railroad showed that the funds collected had been commingled with funds from other sources, and that expenditures had been made from this commingled fund for purposes beyond the proper scope of the fees' justification. This Court first held (300 U.S. at 161-162) that the statute was not void on its face, as this Court held concerning Section 2, Eleventh, in *Hanson*, 351 U.S. 225 (1956). The opinion then turned to the different question of whether the act, valid on its face, was rendered unconsti-

tutional in fact by its application imposing fees for purposes beyond the constitutional limits. The Court held (300 U.S. at 161, 164) that in such a situation commingling and inadequate records made it impossible to determine whether the money being collected "is for a purpose other than the legitimate one." The burden is on those seeking to collect the charges; they must come forward with evidence to establish that the charges demanded and collected do not exceed the reasonable cost of the activity that supports the exaction, and that the charges will not be diverted to some other purpose. Upon failure of the defendant to discharge this burden of proof, the statute was declared unconstitutional, the exaction was enjoined completely, and the state forbidden to "part of it." 300 U.S. at 161. The Court concluded (300 U.S. at 168):

"As was said in the Foote Case [232 U.S. 103], 'a state is at liberty to intermingle duties involving costs properly chargeable to the railroads, with duties involving costs not so chargeable, but if it does so, when the exaction is challenged, it must assume the burden of showing that the sums exacted from the railroads do not exceed what is reasonably needed for the service rendered.'"

Here the "service rendered" is the service rendered by the appellant unions as statutory agents in the field of collective bargaining. Not only have they failed to show that the amounts collected are "reasonably necessary for this service; they have stipulated (R. 176, 191) that the funds collected "have been, are being, and will be used in substantial part for purposes other than the payment of wages, maintenance, and administration of agreements concerning rates of pay, rules and working conditions, wages, hours, terms and other conditions of employment, and the handling of disputes relating to the above."

to be used. This Court  
tion, where  
difficult to  
to be used  
", "the  
ge." They  
at the funds  
onable cost  
at the funds  
on the fail-  
f proof, the  
ion was en-  
collect any  
cluded (300

. 494], the  
olving costs  
others in-  
oes so, and  
the burden  
e appellant  
the service

performed  
ie processes  
ed to prove  
needed" for  
1) that the  
ill be used  
he negotia-  
ements con-  
ditions, or  
ployment, or  
", and are.

on the contrary, being used for political purposes which do not involve and are unnecessary to" the above activities.

It is unnecessary to extend this brief by including other examples of decrees enjoining the collection of any part of an exaction based on an assertion of power denied by the Constitution. Despite the Solicitor General's "difficulty in understanding" the principle, it is settled that the "proper expenditure of part of the general dues funds" does not "excuse appellees from paying any part of the fees, dues, and assessments called for by the agreement."

The Solicitor General concedes that delicate constitutional questions are raised by the appellants' political activities and expenditures, but seeks to avoid the necessity of deciding them by his argument that in any event the activities and expenditures are "impliedly prohibited" by Section Eleven<sup>a</sup>. He thus supports the decision of the courts below that some activities are wrongful, although upon different grounds. The only question remaining relates to the form of relief. The injunctive portion of the decree, he asserts, is unnecessarily broad since it prevents collection instead of expenditures. The argument, even if it were sound, would not reach the damages<sup>24</sup> portion of the relief granted, however, and the Solicitor General apparently believes the judgment below to be correct to this extent.<sup>25</sup> Thus,

<sup>24</sup> Three of the appellees, not protected by supersedeas bonds, were awarded restitution of the dues and fees they had paid under compulsion of the union shop agreement in the amounts of \$158.133.50, and \$151.50 each (R. 106).

<sup>25</sup> The Solicitor General complains of the lack of evidence on a finding concerning the feasibility of segregating the dues and fees of dissenters in the future (brief, pp. 14, 15 n. 6, 45), but does not question the specific finding of the trial court that "by the commingling of funds" the appellant unions "have made it impossible to segregate the amount of dues collected from plaintiffs" unions for political purposes in the past (R. 104).

Solicitor General's argument, if accepted, would result in at least partial affirmance of the judgment below.

**B. The Supposed "Alternative" Remedy Would Be Either Illusory or Identical in Operation With the Decree Entered.**

The Solicitor General has suggested that there may have been an alternative remedy available to the individual appellees for the enforcement and protection of their rights and that the decision below should be reversed or modified for their failure to pursue this supposed alternative remedy. Assuming that the supposed remedy is in fact a genuine alternative, there is no authority referred to in the brief, nor is there any, to compel the appellees to seek this alternative instead of the remedy they chose, or to alter the basic principle that a plaintiff is free to select for himself the various forms of relief afforded by the law. The Solicitor General concedes (brief, p. 47) that he has no decision to support such a denial of the individual appellees' right to choose, or to confine the discretion of the court below in fashioning the decree to meet the needs of the particular case.

The supposed alternative remedy offered by the Solicitor General is based on his avowed difficulty considering the expenditure of funds in understanding how wrongful expenditure of public funds collected can excuse the payment of any, and is based on the misconception that the decree entered was proper for this reason. So long as the appellants' right to their contribution is their assertion of the right to use any or all of the contributions for any political purpose whatever, the expenditure of course, is proper. Mistaking this principle, the Solicitor General argues that the remedy should have been a writ of injunction against the expenditures complained of.

---

<sup>28</sup> See, e.g., *The Fair v. Kohler Die & Specialty Co.*, 298 U.S. 307 (1936).

ld. require at

Be  
th

might have  
individual ap-  
their rights,  
or remanded  
ernate route.  
ct a feasible  
in the brief,  
k that remedy  
r the general  
himself among  
e law.<sup>26</sup> The  
he has found  
individual ap-  
eration of the  
the needs of

the Solicitor  
sidered above  
of part of the  
and is predi-  
ntered is im-  
nts persist in  
the appellees'  
er, the decree,  
the Solicitor  
e been an in-  
ed of. How-

Co., 228 U.S. 22

ever, to prohibit the appellants from making any ex-  
tures for political purposes would restrict unneces-  
the privilege of willing members to join together *vol-*  
*untarily*, through the union, to exercise their political  
collectively. Such a decree would raise the objections  
sidered by this Court in *United States v. C.I.O.*, 335  
106 (1948), and *United States v. U.A.W.-C.I.O.*, 352  
567 (1957). The Solicitor General apparently has fail-  
appreciate that the trial court exercised scrupulous  
to avoid any limitation of *voluntary* collective action  
fashioned the decree accordingly.

It has been suggested, however, that perhaps the  
court might have limited its injunction to a prohibi-  
solely against the use for political purposes of the m-  
contributed by the appellees and those who share  
interest in preserving their constitutional liberties;  
the union members might then be permitted to "contra-  
or "contract out" by notifying the union of their ele-  
to allow, or not to allow, use of their contribution  
political purposes. Or perhaps, the Solicitor General  
suggested, the decree could have provided for the seg-  
tion of the contributions of the appellees and like-m-  
employees into a special fund limited in use to colle-  
bargaining. Or, continuing the exercise in imagination,  
decree could have provided for a *pro rata* reduction of  
appellees' dues, fees, and assessments, in the ratio of  
appellants' expenditures for political purposes to tota-  
penditures. But the marshaling of hypothetical possi-  
ties is put aside by the Solicitor General with the obs-  
tion (brief, p. 46): "Such questions need not be res-  
at this time, however, for no relief of this kind was  
requested by the appellees or granted by the courts be-

We agree that the questions are premature, but  
fundamentally different grounds. The Solicitor Ge-  
has ignored the fact that the decree entered below,

not foreclose any possible "remedies". As explained (pages 28-31), the court below employed the device used by this Court in *Brown v. Board of Education*, 349 U.S. 294 (1955), and left it to the appellate first instance to propose which of the various remedies will be adopted. Certainly it is the appellants themselves who should first have the opportunity to propose a plan which will disrupt least their structure and interests. Nothing in the principles controlling equitable relief requires the court to deny such an opportunity. A proposal has been submitted, approved by the court and embodied in a decree, it will be time enough to question the propriety of the particular form of relief sought on appeal by the appellant unions upon these grounds. It would be premature, since the question has not yet been decided in the orderly progress of the litigation. By the Solicitor General gains no greater right than he would have to inject questions into the case at this order.

Flexible equitable principles empowered the court to declare the underlying principles governing the grant of relief to the individual appellees pending the proceedings, and impose the burden upon the appellants coming forward with a proposal for a permanent form of control. Even if, for some reason, the Solicitor General were justified in ignoring what was in fact decided by the court below, and in misconceiving the decree contemplated no further proceedings, the decree should be set aside in favor of the supposed alternative. The appellees back to the trial court after nearly a year of effort in the state and federal courts, with the result that they should start afresh with a new "prayer for relief" and expenditure of the receipts from appellees' funds for the disputed purposes" (brief, p. 46), would be at best and an effective denial of their rights.

explained above  
 the equitable  
*d of Education*;  
 appellants in the  
 ous schemes or  
 he unions them-  
 ty to select the  
 and operations.  
 itable relief re-  
 y. When a pro-  
 court, and em-  
 to consider here  
 ief adopted. An  
 e grounds would  
 et been reached  
 By intervention,  
 than appellants  
 se out of proper

the courts below  
 ning the dispute,  
 pending further  
 the appellants of  
 permanent system  
 Solicitor General  
 act done by the  
 ere as if it con-  
 ee should not be  
 native. To send  
 early eight years  
 th the advice that  
 er to restrain the  
 es' fees and dues  
 , would be futile  
 ghts at worst.

In *Clay v. Sun Insurance Office, Limited*, 363 U.S. 499 (1960), Mr. Justice Black said in the course of a dissenting opinion in which Chief Justice Warren and Mr. Justice Douglas joined (363 U.S. at 214, 224):

"I believe that there are times when a constitutional question is so important that it should be decided by the courts though judicial ingenuity would find a way to avoid it."

. . . . .

"Litigants have a right to have their lawsuits heard without unreasonable and unnecessary delay and expense."

Mr. Justice Douglas, in a separate dissent, stated (363 U.S. at 228):

"Some litigants have long purses. Many, however, hardly afford one lawsuit, let alone two. Shutting out parties between state and federal tribunals is a way of defeating the ends of justice. The purpose of justice is not an academic exercise."

Those statements are applicable here.

**B. *Mere tracing of the appellees' contributions would be futile.***

If the Solicitor General intended to suggest as a remedy a decree requiring the unions simply to segregate and account for funds originating with the appellees and like-minded members and to assure that these funds are not diverted through political channels, he is inviting this Court to require the unions to make vital protections of the Bill of Rights to the measure of the level of juggling books of account. The appellants could always attribute a political expenditure to the contributions of others, and by a tidy bookkeeping enter any protest from unwilling members. Certainly it

be believed that a decree so limited would provide adequate alternative means to protect the individual appellees.

**2. The suggested "alternative" would be the equivalent of the decree entered.**

If, as we prefer to believe, the Solicitor General is to suggest that the decree should be framed in more than the resourceful allocation of a properly labeled account, and to afford redress, then the difference between the supposed remedy and the decree entered becomes a matter of words. If the appellant unions are not to shift a disproportionate share of the costs of the remedy gaining to dissident members, and are in fact to the use of money *voluntarily* contributed in making *political* expenditures, then the decree below is without error. A general injunction against the use of compulsory dues, fees, and assessments for such purposes would require, if intended to be effective, that the appellant unions alter their conduct and operations. In the exercise of its constitutional power to supervise, enforce, or modify the decree the court would of necessity inquire into the details of the operations and appraise its good faith and its ability to preserve constitutional freedoms. This is the procedure contemplated by the decree now before the Court. To send the individual appellees back to state court to re-word the decree without changing its substance and operating effect would serve no purpose but delay. This Court does not sit as a supreme court to require that the state courts conform to prescribed linguistic artistry in the use of language. So long as the decree is correct in its practical operation and substance, it must be affirmed.

ould provide an adequate rights of the indi-

the functional

Solicitor General meant framed to require of expenditures to a relief of substance, proposed "alternative" es only a matter of ot to be left free to sts of collective bargaining fact to be restricted uted for the purpose the decree entered junction against the ssments for political be more than precaution their existing practices continuing jurisdiction the decree, the trial the altered plan of and effectiveness to is precisely the proposed before the Court. to the trial court to substance or operation delay and frustration editor to assure prescribed standards of long as the decree is substantive effect, it

**C. To Compel the Individual Appellees to Bear the Burden of Supervising Future Expenditures Would Finally and Effectively Deny Their Constitutional Rights.**

Viewed in another light, the hypothetical "alternative" remedy offered by the Solicitor General would differ significantly from the decree already entered. It would, in fact, be tantamount to an absolute denial of the appellees' rights under the First and Fifth Amendments.

If a decree were entered in the form of a general injunction restraining the appellant unions from making expenditures from the contributions of the individual appellees and other dissenting employees, with no accompanying obligation upon the unions to submit a plan of compliance to the scrutiny of the court, the appellees would be stripped of any meaningful protection and would be left at the mercies of the unions as in the past. After long years of costly litigation, these six railroad unions would be told by the Court that they must keep a constant vigil over all the manifold branches and channels through which their moneys are transmitted and distributed, to follow the labyrinths of the unions' internal transactions and retransfers of funds, to police every expenditure in any guise, to act as a censor of publications and a supervisor of the activities of every officer and lobbyist. The unions themselves profess to be unable to trace their funds through the multitudinous channels of internal transmission. How much less can the individual appellees, as rank outsiders, be expected to trace their dollars through the mazes of a hostile and gigantic complex of unions, internationals, super-committees and sub-committees. By happenstance, the individual appellees should be required to anticipate future expenditures, they would be compelled to resort to the court in each instance to prevent

bursement, or to incur the expense and burdens of pursuing the remedies for contempt if they reached the courts too late.<sup>27</sup> The burden upon the Courts, as well as upon the individual members, would be overwhelming.

If, to protect his \$60 or \$100 per year, the individual worker must assume such burdens, then the courts have failed him. Insurmountable procedural obstacles are as effective in destroying rights as judicial declarations. See, *v.g.* *Marino v. Ragen*, 332 U.S. 561, at 564 (1947). (Mr. Justice Rutledge, concurring); *Davis v. Wechsler*, 263 U.S. 22 (1923). When the hallowed freedoms of belief and expression are at stake, the individual need bear no burden of proof beyond showing that his freedoms have been impaired. *Speiser v. Randall*, 357 U.S. 513 (1958).

#### **D. The Supposed Legislative Remedies Are Unavailable or Inapposite.**

In the course of an effort to find a ground for avoiding the responsibility of deciding the controversy, the Solicitor General has referred the Court to a proposed bill which Congress refused to enact (brief, p. 44), a law of Great Britain (brief, p. 46 n. 32), and an act of Congress passed five years after this action was commenced that has no application to these facts (brief, pp. 46 n. 33; 48-49).<sup>28</sup> He

<sup>27</sup> As the Solicitor General's brief (p. 47) states the point, "... in order to restrain a particular kind of activity or expenditure, the dissenting members would have to show that the particular kind of activity or expenditure infringed upon their rights."

<sup>28</sup> The statute is addressed not to the constitutional questions presented by a government-authorized union shop engaged in political activity, but to the fiduciary obligation of an officer of a purely voluntary association, for the prevention of embezzlement. The Solicitor General reports (brief, p. 49) that the legislative history establishes that the law would not have been intended to apply to this case even if it had been enacted in time to be relevant.

has not suggested that this varied legislative activity has any bearing on the appropriate remedy for the wrong suffered by the appellees. It is not for this Court to remedy legislative mistakes by enacting a statute Congress refused to adopt, or to add provisions which Congress rejected. The relevance of speculation about what Congress might have done but did not do in the way of affording remedies is indeed a mystery.

Perhaps the significance of this legislative material is revealed by the Solicitor General's concern (brief, p. 29) for the "intensity of the feelings aroused" concerning union political activity, and the consequent necessity for "judicial caution." If by this observation it is meant that the Court should avoid decision when the issue "arouses intense feelings," then the great historic declarations of constitutional principle that have marked the work of this Court from its early years to the present have all been improper.<sup>29</sup> It appears that "caution" has been mistaken for timidity, and that the age-old maxim that "a timid judge is a lawless judge" has been ignored.

The motivation of the Solicitor General is further revealed by the canvass of current legislative activity, and

---

and concludes the discussion by taking no position at all (brief, p. 49).

The reference (brief, pp. 47-48) to the "alternative remedy" suggested by the dissenting Justices in *United States v. C.I.O.*, 335 U.S. 106, 149 (1948), is misleading. The "alternative" there offered was an alternative to a *criminal prosecution* in voluntary unions where the member who does not wish to contribute does not jeopardize his job, and where the obvious "alternative remedy" is simply to quit the union.

<sup>29</sup> Mr. Justice Whittaker appropriately has remarked:

"Since the function of the Court is to resolve great issues, it is inevitable that it must proceed in the midst of tensions, and it always has." Address before Federal Bar Association, Chicago, Illinois, Sept. 17, 1960, 7 Federal Bar News 370, Dec. 1960.

the expressed hope that "further clarification" may result from future legislative action. (his brief, pp. 52-53). In plainer terms, the Court is advised to "pass the buck" by delaying decision until some other branch of government has solved the problem.

In the same vein is the expressed concern (his brief, pp. 30-31) over the fact that the rights of many citizens, numbering perhaps in the millions, may be affected by the principle at issue. But the Solicitor General appears to regard the possibility that the sacred constitutional rights of millions of Americans may be violated day by day as a reason for putting the question aside and evading decision rather than as an overwhelming demonstration of the very importance and immediacy of the issue calling for decision.

It may be that considerations of the intensity of public feelings and the magnitude of the question are appropriate factors to be considered by the officers of a political branch of government. They have no place in the work of the Court, entrusted with preserving constitutional rights against the clamor of the majority.

The same considerations of political expediency and preoccupation with legislative supremacy furnish a clue to the unusual reliance upon English precedents. A casual reader of the brief submitted by the Solicitor General and the responding brief of the appellants might be led to believe that the issues are governed by the laws of Great Britain. Both briefs delve deeply into the statutes, judicial decisions, and even the executive actions in that country which relate to the propriety of political activities of trade unions (Solicitor General's brief, pp. 29, 30, 33, 34, 40, 42, 32; appellants' responsive brief, pp. 8, 9, 10, 11, 12). In many areas of the law, English experience no doubt affords a useful subject of comparative study. But England, not governed by no written constitution, her legislative power

is supreme, and her courts have neither the power nor the duty to set aside acts of Parliament. It was the very purpose of our Bill of Rights to alter that situation, to break with the English tradition, and to subject the legislative authority to fixed limits enforceable through the judiciary.<sup>30</sup> When a constitutional right is at stake, British guidance is useless, and English decisions are inapposite.

It is significant, also, that the union shop "in Britain is not a subject of collective bargaining" and there is no legally-enforceable compulsory union membership there—diametrically opposite to the situation here. Lenhoff, *The Problem of Compulsory Unionism in Europe*, 5 Am.J. Comp. L. 18, 43 (1956); Ludwig Teller, *British v. American Labor Laws and Practices: A Study in Contrasts*, American Bar Association Section of Labor Relations Law, 1957, pp. 28-29; Rothschild, *Government Regulation of Trade Unions in Great Britain*, 38 Col. L. Rev. 1335, 1390 (1938); Mathews, *Labor Relations and the Law*, Little, Brown & Co., 1953, p. 496. Since government in England neither sponsors nor enforces the union shop, the situation is vastly different and, indeed, the fact that government in England deems necessary *any* regulation respecting political expenditures by unions serves to highlight the need for the relief granted by the lower court under the facts of this case.

The appellant unions, in their response, state (brief, pp. 8-9):

"The Government's brief suggests the possibility of 'contracting out' of a portion of the dues because of political activities, as is provided by statute in Great

<sup>30</sup> See the remarks of Mr. Justice Black in *The Bill of Rights*, 35 N.Y.U.L. Rev. 865 at 867-870 (1960), and Section I.D. *supra*, pp. 32-33.

Britain. Brief, pp. 29-30, 45-6. But any such relief for dissidents is obviously a legislative matter within the discretion of Congress; it is simply impossible to find any such affirmative requirements in the Constitution. Some of the Justices of this Court have recognized the possible desirability of such or similar legislation but never has it heretofore been suggested as a constitutional requirement. *United States v. U.A.W. C.I.O.*, 352 U.S. 567, 597-8; *United States v. C.I.O.* 335 U.S. 106, 149-50."

This is indeed a naive and cavalier way to approach this important point of constitutional law. The requirements of the First Amendment are negative and not positive. Government cannot deprive an individual of his fundamental rights of freedom of speech, religion, politics, association etc. The First Amendment does not require unions to "contract out" but does require them (in the exercise of their assumed regulatory powers) to refrain from interfering with the sacred rights guaranteed under that Amendment. It is sheer bravado for the unions to beat their breasts and say of the Solicitor General's suggestion to "contract out": "... it is simply impossible to find any such affirmative requirements in the Constitution."

It bears repetition that the unions in governmental roles are required to respect the freedoms guaranteed by the Bill of Rights, and, if they do, there is no occasion to talk about their alleged duty to "contract out" or "contract in". They are presumed to know how to deport themselves to meet the plain requirements of the First Amendment.

## III.

**The decision below properly declared Section 2, Eleventh, unconstitutional as applied to the appellees under the facts proved.**

The brief filed by the Solicitor General repeatedly charges that the court below committed error because it held that Section 2, Eleventh, of the Railway Labor Act is unconstitutional. That argument, however, is directed solely to matters of form, and does not touch the substantive issues. Whether the statute is held to be unconstitutional on its face, in its application to these facts, or inapplicable to support the exactions because constitutional limitations are to be read into it, the decree entered is correct. Even if there were some merit in the Solicitor General's argument—and there is none—the situation would be that of a court reaching the right result for the wrong reason, and the decree should still be affirmed.

**A. The State Courts Correctly Held the Statute Unconstitutional, Not on Its Face, But in Its Application Between These Parties.**

A basic defect in the Solicitor General's argument is his failure to distinguish between a statute unconstitutional on its face and a statute unconstitutionally applied.<sup>31</sup> If the statute *by its terms* infringes upon constitutional rights, it is void for all purposes, and may not be applied in *any*

<sup>31</sup> Typical of the Solicitor General's failure to appreciate the distinction between unconstitutionality appearing *on the face* of the act and unconstitutionality *in application to particular facts* is the following statement from his brief (p. 20):

"Whether or not any or all of the disputed expenditures are improper, Section 2, Eleventh, is valid and constitutional. The union shop agreements are also valid on their face and in general, even though particular expenditures may be illegal."

case, no matter how clearly permissible the result may have been under a statute more narrowly drawn, a statute which is constitutional "on its face" will not necessarily be adjudicated to be constitutional in its application where it may be invoked as authority and applied to a concrete factual situation. The cases drawing this distinction are legion. See, *e.g.*, *Lassiter v. Northampton Board of Elections*, 360 U.S. 45, at 53-54 (1959) and *City of Baxley*, 355 U.S. 313 (1958).

In the application of these principles to the question of the constitutionality of monetary exactions, the Court has held that a statute which on its face authorizes contributions for legitimate purposes will be unconstitutional if the moneys are in fact used for purposes which invade constitutional guarantees. Thus in *Northern Ry. v. Washington*, 300 U.S. 154 (1937) the principles applicable to the case at bar were declared (300 U.S. at 160-161):

"... A law exhibiting the intent to impose a compensatory fee for such a legitimate purpose is on its face reasonable. . . . Such a statute may, by reason of the presumption of validity, show on its face that a part of the exaction is to be used for a purpose other than the legitimate one of supervision and regulation, and may, for that reason, be void. And a statute which upon its face may be shown to be void and unconstitutional on account of its actual operation. If the exaction be clearly excessive it is bad in toto and cannot collect any part of it" (footnotes omitted).

As stated previously in this brief (pp. 49-50), the Court went on to hold the statute in question valid on its face but unconstitutional in its application, since the moneys collected had been expended for improper purposes. On the other hand, a statute is attacked before it is applied and enforced, as in *Hanson*, perforce it can be

result would  
drawn. But a  
will not neces-  
in every case  
applied to a  
g the distinc-  
npton County  
59); *Staub v.*

he determina-  
xactions, this  
face calls for  
be rendered  
d for purposes  
thus in *Great*  
937), the prin-  
red as follows

impose a com-  
pose is prima  
y, in spite of  
face that some  
purpose other  
nd regulation  
a statute fair  
nd unenforce-  
f the exaction  
and the state  
mitted).

0), this Court  
d on its face  
ce the money  
purposes. If  
e it is applied  
be tested only

on its face, and conjectural possibilities of misuse or cannot be considered. In *Bourjois, Inc. v. Chapman*, 301 U.S. 183 (1937), decided in the same term as *Great Northern Ry. v. Washington*, *supra*, and involving the same ground of tax, a newly enacted statute was attacked upon the ground that the amounts collected might, in the future, be used for purposes which would render the statute unconstitutional. Mr. Justice Brandeis stated for the Court (301 U.S. at 187-188):

"... The case was heard shortly after the statute became operative. It was obviously impossible to determine whether the fees would prove to be in excess of the administrative requirement, and in the situation it is sufficient if it is shown that the fees are not unreasonable on their face. ... The mere fact that the fees imposed might exceed the cost of collection is immaterial."<sup>22</sup>

Within this framework, the *Hanson* case is the counterpart of *Bourjois, Inc. v. Chapman*, *supra*, while the instant case is the counterpart of *Great Northern Ry. v. Washington*. The *Hanson* case, 351 U.S. 225 (1956), raised the issue of the constitutionality of Section 2, Elevator Act, on its face, while the instant suit presents the question of constitutionality as applied as the instrument to political and ideological support.<sup>23</sup> In *Hanson*, this

<sup>22</sup> The Court went on to point out protections afforded by the statute there but not provided here (301 U.S. at 188).

"The statute provides that the fees collected shall be used solely to the enforcement of this Act; and the Act regulates but one class of activity. The record shows that the State Treasurer has set up a separate account to which cosmetic fees are credited, and against which are to be debited only the expense of enforcement."

<sup>23</sup> It will be noted that the prayers in the petition (R. 106) and the language of the decree (R. 106) make it plain that the attack on the Act and contract is "to the extent that it is or is applied to permit" certain conduct.

held the section not to be unconstitutional and therefore not vulnerable to a prospective attack had been put into effect. But the decision served the question of the constitutionality of Eleventh, *as applied*, if its authority should cover for forcing ideological conformity on in contravention of the First Amendment," General recognized and quoted (brief, p. 37) recognizes in addition that the evidence poses questions "not presented by the record" (brief, p. 37). In an unexplained contradiction that brief repeats the assertion that the constitutionality on its face, and that the union statute made under it are "valid in general and in particular" (brief, pp. 35, 39). These assertions do not raise the issues raised by appellees. Not once does the Solicitor General's brief face the issue that is presented: the constitutionality of Section 2, Eleventh, as administered and enforced by the parties to this union should exact money from unwilling appellees for the ideological purposes shown by the concrete facts here.

He readily concedes, however, that the "delicate constitutional questions" (brief, p. 37) are clear that if any constitutional question is involved in an application of Section 2, Eleventh, that statute which authorizes the arrangement between appellants and the railroad under which the union is claimed to be required. The invasion of constitutional rights is sought to be justified as results from the application of, the Act of Congress. The Act is, *to that extent and as so applied*, unconstitutional. No more was decided by the court below. It is stated (R. 106):

nal on its face, and  
ve attack before it  
ision expressly re-  
ality of Section 2,  
ould be used "as a  
ty or other action  
t," as the Solicitor  
p. 37). His brief  
ce here presented  
record in *Hanson*"  
radiction, however,  
he statute is con-  
n shop agreements  
and on their face"  
not meet the issues  
Solicitor General's  
the unconstitution-  
tered, applied, and  
shop contract, to  
or the political and  
ete facts of record

the case involves  
, pp. 23, 17). It is  
n is presented, it  
eleventh, since it is  
ement between the  
a the exactions are  
of the appellees'  
stified under, and  
Congress. and the  
7, unconstitutional.  
w. The trial judge

"... I find and declare Section Two (Eleventh  
said Railway Labor Act to be unconstitutional  
*extent that it permits, or is applied to pe*  
exaction of funds from plaintiffs and the c  
represent for the complained of purposes and  
set forth above, . . ." (italics added).

The trial court thus observed the critical d  
which the Solicitor General has ignored.

The same considerations dispose of the Soli  
eral's repeated claim that the union shop a  
"itself" is not invalid, and that the court below c  
fatal error in so deciding. If Section 2, Eleventh,  
stitutional as applied and asserted against the ap  
this case, regardless of its general validity, then  
tract which rests upon the authority of that sta  
fall to the same degree. It cannot validly be a  
the appellees, or to the members of the class th  
sent, so long as the unconstitutional condition  
These are precisely the limits of the holding be  
trial judge stated (R. 106):

"... I hereby declare the union shop agree  
to be null, void, and of no effect *as between th*  
and that the *above-described enforcement* of s  
shop agreements is illegal *in that it depriv*  
*tiffs*, and the class they represent, of the al  
tioned personal rights guaranteed by the Co  
of the United States . . ." (italics added).

An additional ground for rejection of this claim  
is furnished by the fact that under the specific  
Section 2, Eleventh, the condition of continued em  
that may be imposed by a union shop agreement  
membership in the form of the payment of perio  
fees, and assessments. The fundamental signific  
union shop agreement, therefore, is the imposition  
to become a member and pay money. It is accordi

leading to speak of the union shop contract as a whole," as if the agreement had some existence as a document apart from the conditions it imposes. Since the exactions for political activity are improper, the court below correctly held that the shop agreement is "null, void, and of no effect as to the parties," and the parties plaintiff, the union and their fellow employees who assumed membership under compulsion and who object to the use of their money for partisan political and ideological purposes, are properly relieved of the primary obligation imposed by the union shop contract, that is, the duty to contribute.

It is likewise misleading to talk of the "majority" in "the form of bargaining" as if the shop agreements embody (Solicitor General's brief, p. 20). The "form of bargaining"—exclusive representation by the union—is not affected by the presence of a union shop; and the "majority" has the right to "bargain together" irrespective of the union shop. It is not whether the majority may force others to contribute to political and ideological activities which the

**B. The Courts Below Properly Held That the Constitutionality of the Statute as Applied Depends on the Purposes for Which Exactions Were Made and the Color of Its Authority.**

The Solicitor General says (brief, pp. 2-3) that "the constitutional issues" are raised by the questions involved in this case, that these issues "have constitutional importance" and that appellee has a "vested interest" (or "right"—see Solicitor General's brief, p. 2) which was "explicitly recognized by the Court in *U.S. at 235-238*" "not to have their money used to support candidates and causes which they abhor, and

contract "itself" or "as some meaningful exchange obligations which for political purposes are held that the union has no effect as between the appellees here and membership under of their contributions for purposes, were properly imposed upon them duty to pay money.

the "interests of the shop" which the union general's brief, p. 41) a union shop" (brief, exclusive representation presence or absence of the right "to associate shop. The question is ers to join them in with the others oppose.

#### at the Constitu- Depends Upon re Made Under

pp. 23-25) that "delivered by the expenditures as "are of great consequence appellees have an "interest's brief, p. 17) which court in *Hanson*, 351 money used to advance or, and to be free of

undue influence" (brief, p. 28). The Solicitor General attacks (brief, p. 31) the assumption "that if *any* expenditure is made from appellees' fees and dues for purposes which infringe constitutional rights, then the entire union shop agreement is illegal and Section 2, Eleventh, is unconstitutional" and he contends that some expenditures are unconstitutional while others are not (brief, p. 32). He then assumes (brief, pp. 35-40) that at least some of the disputed expenditures are unconstitutional. He contends that the applicable statutory provisions and the union shop contract itself are nevertheless valid—the theory that the statute does not authorize invalid expenditures; and the Solicitor General says (brief, p. 32) that the contract should not be enjoined even though a substantial part of the expenditures under it are unconstitutional.

In short, the Solicitor General seeks to separate the union shop contract from the statute which authorizes it and seeks to separate the expenditures under the statute from the contract which provides the enforced conditions enabling the expenditures. Courts uniformly have refused to sustain such an artificial separation, holding that they must look at the "total operation and effect" and not from their view to a keyhole, disjointed analysis of the related whole.

The Solicitor General himself evidently recognizes that he cannot separate the results of the union shop expenditures—from the contract itself and its origin, for he admits (brief, p. 41) that "appellees have been granted powers by the government and are therefore under corresponding obligations." Moreover, he necessarily concedes that the expenditures are an integral part of the statutory and contractual scheme when he says that appellees have the right to challenge them.

tutional grounds, though he argues that the challenge should be made in a different form. If, as the Solicitor General appears at times to suggest (brief, pp. 41-42), the unions were merely "private associations", unauthorized and unsupported by government, there could be no constitutional issue arising out of their expenditures. The Constitution protects individuals against action which is directly or indirectly that of *government*—not against mere private individuals or associations.

Thus, by proposing alternative methods whereby appellees conceivably could challenge the constitutionality of the expenditures and obtain determination of the "delicate constitutional issues", the Solicitor General necessarily admits that the Railway Labor Act and the union shop contract represent governmental action which in fact is (or at least, in the Solicitor General's view, probably is) impairing the constitutional rights of appellees to freedom of speech, association and political action. Such admission is unavoidable and is entirely accurate.<sup>34</sup>

This means that it is the *government* which is requiring appellees to pay the money which appellants are using to

---

<sup>34</sup> As we have shown in our original brief (pp. 46-63), the union shop contract represents governmental action because (1) it depends on the supremacy of federal legislation for its existence, (2) it depends on federal law to bind minorities, (3) the labor representatives themselves are designated pursuant to federal action, (4) the labor representatives perform a governmental function and serve as an instrument of governmental policy, (5) the labor representatives exert governmental power in negotiation and bargaining, (6) governmental power was expressly exerted in negotiation of the union shop contract; and (7) the union shop contract depends on federal agencies for its enforcement. This Court itself said in the *Hanson* case (351 U.S. at 232) that:

"If private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded. . . . In other words, the federal statute is the source of the power and authority by which any private rights are lost or sacrificed."

achieve objectives which appellees oppose. It is the *government* which says to the union, in effect, "You may use the funds forcibly extracted from appellees through governmental action for any purpose, without reference to any applicable statutory or contractual restriction." It is the *government* which has forced appellees to make payments to the unions without any protective standards to prevent the improper expenditures here complained of.

Since government is involved and since the unlawful expenditures result from governmental action extracting the funds from appellees, the end result—unlawful expenditures in violation of appellees' constitutional rights—cannot be separated from the statute and the contract which made such expenditures possible; and there is no possible merit in the Solicitor General's suggestion that the improper expenditures be isolated and declared unconstitutional while their legislative and contractual source is held constitutional.

To summarize, the Solicitor General first states that the expenditures for political purposes are authorized by Section 2, Eleventh, to a degree sufficient to render the expenditures unconstitutional, and then insists, illogically and inconsistently, that the expenditures are somehow not *authorized enough* to render the statute which is the source of authority for exacting the funds unconstitutional *to the extent that it is so applied*. Such gossamer distinctions have no place in constitutional precedent. To accept that argument would allow every delegate of governmental power to evade judicial scrutiny of the constitutionality of his acts by asserting—to compound the wrong—that he has exceeded the limits of the power conferred.<sup>35</sup> For reasons

<sup>35</sup> Whatever claim to contributions from the appellees the appellant unions may make, the claim is based upon power conferred by Section 2, Eleventh. Constitutional limitations are not evaded

that are plain enough, this Court consistently has held that a statute is rendered unconstitutional in its application by a wrongful use of moneys collected under its authority.

. Whether the statute is unconstitutional to the extent that moneys collected under its authority are diverted to expenditures for improper use, as this Court in other cases and the lower courts in this case have held, or whether it is the expenditures made from funds collected under authority of the statute that are unconstitutional, is a matter of no practical consequence. In either case, the necessary and appropriate relief would be the same.

The brief of appellant unions is realistic in recognizing that expenditures pursuant to the union shop contract cannot be separated from the statutory and contractual authorization therefor. Appellants boldly assert (responsive brief, pp. 2-4) that Congress contemplated precisely the expenditures here complained of, intended that they should be made and deliberately "refused to impose restrictions against such expenditures. This deliberate decision by Congress is reflected, say appellants, in refusals to impose restrictions both before and after the union shop amendment to the Railway Labor Act. Appellants agree with appellees that the constitutional issues are properly and adequately presented in this case and that the Court should either affirm or reverse the trial court's decree.

---

by an assertion that the action in question is a "[m]isuse of power possessed by virtue of . . . law and made possible only because the wrongdoer is clothed with the authority of . . . law." *United States v. Classic*, 313 U.S. 299, 326 (1941). See also *Baldwin v. Morgan*, 251 F.2d 780, 786 (5th Cir. 1958): "The difficulty . . . on this point stems, we think, from his mistaken notion, several ways implied, that an action of a person cannot be state action (under color of law) if it is contrary to or in excess of authority granted under state law, or if the state law were invalid."

<sup>28</sup> See the cases cited in sections II A and III A of this brief *supra*, pp. 48-52, 63-68.

In summary, it appears that either implicitly or explicitly both the Solicitor General and the appellant unions agree with individual appellees that *Congress* is responsible for the expenditures of which appellees complain; the Solicitor General agrees with appellees that some such expenditures are (or probably are) unconstitutional; the appellants agree with appellees that all such expenditures must stand or fall with the statute and the union shop contract; and, while the Solicitor General has sought to separate the expenditures from their statutory and contractual source, his own analysis of the problem belies the effort at separation.

**C. Section 2, Eleventh, Is Unconstitutional to the Extent That It Confers an Unlimited Power to Force Exactions from Railroad Employees.**

The Solicitor General contends that, even though expenditures under the union shop contract may impair the constitutional rights of appellees, the statutory basis for the contract should not be declared unconstitutional. He says (brief, p. 38) that "the Act does not purport to, and does not authorize or sanction, 'political' expenditures which would be in violation of appellees' constitutional rights, or which would be otherwise unlawful. . . . On this subject of 'political' expenditures, the statute itself stands as if it explicitly provided that the union may make only such 'political' expenditures as it may properly do under the Constitution and laws. It contains an implied prohibition against the use by the unions of dissenters' monies in any manner which would violate their constitutional or other rights."

The Solicitor General's contention that there is an implied prohibition against the use of appellees' dues and fees for political and ideological purposes is belied by the very terms of Section 2, Eleventh (45 U.S.C. §152, Eleventh, 64 Stat. 1238):

"Eleventh. *Notwithstanding any other provision of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, or any carrier or carriers as defined in this Act, no labor organization or labor organizations duly organized and authorized to represent employees in accordance with the requirements of this Act shall be permitted—*

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class" (*italics added*).

Moreover, it is at once apparent that if all statutes, regardless of the letter, contain a prohibition by "implied prohibition" under this "bootstrap" line of reasoning, there will be little reason ever for this Court to review on constitutional grounds legislation enacted by Congress, particularly regulatory legislation of the type represented by Section 2, Eleventh. The language quoted above is the only possible indication that Congress intended that Section 2, Eleventh, be impeded by no "implied prohibition".

The obvious answer is that government may not disclaim responsibility for unlawful conduct which it authorizes and promotes when such conduct could not occur without governmental authority. The government cannot say that it authorizes the unions to collect money forcibly from workers on pain of discharge, but since we have limited the uses to which the money is to be put, we have no responsibility if the money is used to destroy constitutional rights." When government authorizes private (or semi-private) associations to act in pursuance of a governmental objective—here declared by this Court to be

bilizing force" designed to "help insure the right to work in and along the arteries of interstate commerce." (*Hanson* 351 U.S. at 235)—it has a duty to see that the action taken pursuant to its authority will comport with constitutional standards.

In *Schechter v. United States*, 295 U.S. 495 (1935), the Court rejected the suggestion that the Constitution would permit *any* delegation of legislative authority "to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries." As to unrestricted delegation even to the President the Court said of Section 3 of the National Industrial Recovery Act (295 U.S. at 541-542):

"... It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, section 3 sets up no standards aside from the statement of the general aims of rehabilitation, correction and expansion described in section 1. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power."

Likewise, in *Speiser v. Randall*, 357 U.S. 513, 524 (1958) this Court held that when a state takes action which may deter or suppress speech, it "must provide procedure amply adequate to safeguard against invasion of speech which the Constitution protects."

Here, of course, no standards have been fixed for use of union shop monies, and, even if it be held that there is an implied requirement that constitutional rights not be impaired, it is obvious that the standards are so vague and indefinite as to be invalid under the ruling in the *Schechter* case and the *Speiser* case. Section 2, EOPB, authorizes unions under union shop contracts to require employees—willing and unwilling—to achieve the Congressional purpose of “stabilizing” labor relations. It prescribes certain standards and protections to prevent discrimination among the “taxpayers”. It provides no standards of protection with respect to the use of the monies contributed by governmental authority and compulsion, and, as the statutory language is concerned, the unions are authorized to use the money for any purpose. The Solicitor General says (brief, p. 39), that the legislative history “falls far short of revealing a congressional intention to authorize expenditures of any kind, much less to authorize expenditures which may impinge upon someone’s constitutional rights.” Thus apparently the Solicitor General concedes that the unions were left free to spend the money as they chose, subject only to the broad standards of constitutionality and case by case rulings by the courts, or to any separate general statutes Congress might enact.

The responsive brief of appellants boldly agrees that Congress imposed no restrictions or standards with respect to expenditures under the union shop contract. The philosophy of appellants is well summarized in the caption of the first division of their responsive brief (p. 2) as follows:

**“I. Congress Contemplated That the Unions Would Make Such Expenditures and at Least Three Members of the Court Has Refused to Restrict Them or to Give Disaffected Members Protection Against Them.”**

We submit that Congress may not delegate to the union such sweeping power over the constitutional rights of employees thus forced to pay taxes or other tribute to the unions. Congress may not walk away from the consequences of the conduct it has authorized, and may not rely on an "implied" condition that the unions will act in compliance with the Constitution. What hope is there that the union would so act when, even at this late date, they say that they are *merely* "private" organizations which have no constitutional responsibility whatsoever?

An "implied" constitutional standard was not deemed adequate in the *Schechter* case, even where the President of the United States was the delegate of Congress.<sup>37</sup> "Implied" constitutional standards were not deemed adequate in the numerous cases decided by this Court where statutes or ordinances purporting to "license" or "regulate" free speech or press were struck down because they gave too sweeping power to the governmental regulatory agency—i.e., they established inadequate "standards" for conduct under the authority granted. See, e.g., *Lovell v. Griffin*, 30 U.S. 444 (1938); *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939); *Schneider v. New Jersey*, 308 U.S. 147 (1939); *Hill v. Florida*, 325 U.S. 538 (1945); *Talley v. California*, 362 U.S. 60 (1960); *Shelton v. Tucker*, 21 U. S. Sup. Ct. Bulletin 245 (Nos. 14 and 83, December 12, 1960).

The fundamental principle applicable to this case is well stated by this Court in *Terry v. Adams*, 345 U.S. 461, 466 (1953), as follows:

<sup>37</sup> See *Carter v. Carter Coal Co.*, 298 U.S. 238, at 311 (1936):

"The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business" (italics added).

"The facts and findings b'fing th within the reasoning and holding of peals for the Fourth Circuit in its two about excluding Negroes from Dem in South Carolina. . . . South Carol every trace of statutory or constitu the Democratic primaries. It did this thereafter the Democratic Party or D of South Carolina would be free to con tory practices against Negroes as vot tion there was that the Democratic ' private groups; the contention here is Association is a mere private group Appeals in invalidating the South C answered these formalistic arguments no election machinery could be sustain or effect was to deny Negroes on acco an effective voice in the governmenta country, state, or community. In do relied on the principle announced in *Supra*, 321 U.S. at page 664, that t right to be free from racial discrimi ' \* \* \* is not to be nullified by a state its electoral process in a form which organization to practice racial discr election.'

"The South Carolina cases are in commands of the Fifteenth Amendm passed pursuant to it."

From the above, it is apparent that the u ment to the Railway Labor Act is unconst of the failure of Congress to impose any r any standards which would prevent the conduct of the unions here complained of operation and effect" of the statute has of fundamental constitutional rights, and precautions to prevent such impairment.

this case squarely of the Court of Appeals. Two recent decisions on democratic primaries in North Carolina had repealed constitutional control of this in the hope that Democratic 'Clubs' would continue discrimination against voters. The contention was that the Jaybird Club was merely a group. The Court of North Carolina practices discrimination by holding that it is not a club if its purpose is to discriminate on account of their racial affairs of their doing so the Court in *Smith v. Allwright*. At the constitutional discrimination in voting state through casting which permits a private discrimination in the in accord with the amendment and the laws

the union shop amendment is unconstitutional because of any restrictions or set of the unconstitutional of. The "practical" has been impairment and Congress took no

Even if one could conclude that the statute is unconstitutional because of the "implied" restrictions on the Solicitor General, it would still be necessary to hold that the union shop contract is invalid because of nothing which would give effect to such restrictions. The practical operation and effect is to deprive a union of their constitutional rights. Paraphrasing this conclusion in the *Terry* case, "the constitutional right is not nullified . . . through casting" the compulsory contribution of funds and the unrestricted expenditure thereof in a form which permits a private organization to interfere with the First Amendment freedoms of employees of a government action to join and contribute to such organization.

In *Collins v. New Hampshire*, 171 U.S. 30, 33, this Court stated:

"The direct and necessary result of a statute taken into consideration when deciding its constitutionality, even if that result is not in so many words either enacted or distinctly provided for. *In language a statute may be framed, its purpose may be determined by its natural and reasonable construction.*" (italics added).

In Section 2, Eleventh, of the Railway Labor Act Congress expressly approved the collection of regular initiation fees, dues, and assessments from employees represented by a union as a condition of employment. Congress itself made no effort to place any limits whatsoever on the use of the unions thus favored might put the money collected in the form of regular dues and fees. Nor, in fact, did it place any limit on the amounts which the unions might exact in the form of regular dues and fees as a condition of continued employment. The net is that Congress, having given

a blanket authority, is responsible for the unions put that authority.

**D. Section 2, Eleventh, Is Unconstitutional to That It Requires Unwilling Membership in or Semi-Political Organizations.**

The Court did not hold in the *Hanson* case could constitutionally authorize compulsion in a private association, certainly not compulsion in a political organization, as a condition of employment.<sup>88</sup>

In the instant case, on the other hand, the record shows that employees are compelled to join or not join of such a political organization. If Congress constitutionally sanction such an arrangement, there is to be no reason why it could not authorize compulsion of continued employment, compulsory membership in political organizations such as, for instance, the National Labor Hall.

When the Court decided in *Hanson*, on the record there before it, that nothing in the provisions of the Constitution of the United States prohibited from authorizing unions to contract with employers, employees must pay their fair share of the cost of the collective bargaining agent representing them.

---

<sup>88</sup> The following colloquy occurred in the oral argument in this Court (Transcript, pp. 59-60):

"Mr. Justice Black: Let me give you an example. Suppose you contract to do this, and he is a member, he had to be a participant, even though he was supporting a political party with which he did not wish to be associated. Does this relieve him from being compelled to join such an association as that? If you don't want to answer it does or not, is that question raised here?"

"Mr. Schoene: I think it is definitely answered by Mr. Justice Black. . . ."

the use to which the

## to the Extent ip in Political

case that Congress  
ulsory membership  
t compulsory mem-  
a condition of em-

l, the record clearly  
to become members  
ngress can constitu-  
there would appear  
orize, as a condition  
membership in other  
instance, Tammany

on the basis of the  
the Bill of Rights  
prevented Congress  
with employers that  
the expenses of the  
ting their craft or

oral argument in the  
59-60):

ou another illustration.  
he had to become a  
even though the union  
which he did not agree  
pelled to subscribe to  
n't want to say whether  
here?

itely not raised here.

class, it went to the very limit of what the Bi  
permits. To go further and to authorize not on  
pulsory payment towards collective bargaining  
but also compulsory membership in a private a  
and especially in a private association that is als  
organization—would violate the fundamental co  
rights of the individual. It would violate the  
association—the right to join or not to join  
organization. *Watkins v. United States*, 354 U.  
(1957); *N.A.A.C.P. v. Alabama*, 357 U.S. 449;  
*Labor Board v. Jones & Laughlin Steel Corp.*,  
33, 34 (1937); *Amalgamated Workers v. Edis*,  
U.S. 261, 263 (1940); *International Union v.*  
*Employment Rel. Board*, 336 U.S. 245, 259 (19  
*v. Stacey*, 151 Me. 36, 116 A. 2d 497, 500 (195

The right to join and its corollary the right  
*Pappas v. Stacey, supra*, are not only a part o  
of individuals under American constitutional  
but are also expressly recognized in the *Univ*  
*ration of Human Rights*. Thus, Article XX of  
ration reads as follows:

"1. Everyone has the right to freedom  
assembly and association.

"2. No one may be compelled to belong  
ciation."

To compel membership in a private associati  
dition of continued employment also would un  
the right to work in the ordinary occupations  
*Wo v. Hopkins*, 118 U.S. 356 (1886); *Truax v*  
U.S. 33 (1915); *Smith v. Texas*, 233 U.S.  
*Takahashi v. Fish and Game Commission*, 3  
(1948); *Wieman v. Updegraff*, 344 U.S. 183.  
*chower v. Board of Education*, 350 U.S. 551

senting opinion of Mr. Justice Douglas in *of Regents*, 347 U.S. 442, 472 (1956).

Clearly, Congress does not have unlin impose conditions on the free exercise of on the theory that it knows best what welfare of the individual. Under the individual has the privilege of making t himself. Just as Mr. Justice Holmes represent in *Adair v. United States*, 208 U.S. 1 that "the question what and how much do, is one on which intelligent people m appellees are entitled to question whether ideological activities of appellants are be run. Indeed, appellees' right to doubt m part of their constitutional liberties. fact—doubts in this area are expressed economists. Wright, *The Impact of the* Brace, & Co., 1951); Bradley, *The Publ Power* (Univ. of Va. Press, 1959).

In addition to invasion of freedom o the right to work, imposition of a conditi such as membership in a political or part ization violates the fundamental politic to the individual by the First, Fifth, a ments to the Constitution of the United

## IV.

**The Solicitor General's analysis of *Lathrop* v. supports the lower court's decree in this case**

The Solicitor General, by a footnote reference<sup>39</sup> 43 of his brief, calls attention to *Lathrop v. Do* 200, scheduled to be argued immediately following the argument of the instant case, and points out that the Court of Wisconsin there made it plain that the state supervise the expenditures of the integrated business state and thereby protect against abuses.

That is but one of several factors which clearly distinguish the *Lathrop* case from the instant one. There is no one to police appellants' expenditures of money collected as dues and fees. Indeed, as previously pointed out, Congress placed no limits either in amount or in kind on the money appellants collect under union contracts and judgments approved in Section 2, Eleventh, of the National Labor Act. Unless protected by this Court, appellants are in every sense of the word, at the mercy of the state and its officials<sup>39</sup> in the use of their dues and fees for the condition of continued employment.

For a more complete analysis of the integrated business case see our original brief, pages 82-85.

s in *Barsky v. Board*

unlimited authority to  
of the right to work,  
that is good for the  
e Bill of Rights the  
g those decisions for  
remarked in his dis-  
S. 161, 191-192 (1908).  
ch good labor unions  
may differ . . .," so  
ther the political and  
e beneficial in the long  
t must be an essential  
s. And—in point of  
sed by many modern  
*the Union* (Harcourt,  
*Public Stake in Union*

m of association and  
dition of employment  
partly political organ-  
political liberty secured  
h, and Ninth Amend-  
ted States.

<sup>39</sup> Appellants are, as we have noted previously, . . .

## CONCLUSION

Like John Lilburne of old, the six working men and women now before this Court as appellees stand for the integrity of individual belief and opinion. The issue tendered is simply whether in this Nation a man shall be free to choose for himself what political programs and candidates he will support or oppose.

Against these appellees stand the appellant unions claiming the guardianship of the working man, not only as to the conditions of his work but also in respect to all his interests as a citizen;—not only as to what his pay shall be, but also as to what he shall believe and say. Zealous for the advancement of their organizations, appellant unions have forgotten that they were conceived to exalt the individual and not debase him. They have assumed the prerogative of making decisions for all their members not only in collective bargaining, but also in the broad fields of politics, government, education, health and national defense. But this Court will not forget that the gravest dangers to human freedom have come from dedicated men, convinced of their cause and blinded to the beliefs of those who choose not to join and follow. This Court can render no greater service to trade unionism than to retrieve it from self destruction by directing it on its lawful course and proclaiming again its essential objective: to guarantee the dignity of human labor through the power of equal bargaining.

To uphold the rights of these six laborers requires no sacrifice of the rights of others. Under the decree, each individual will be free to support his own beliefs with his own voice and his own money, and like-minded people may

join together if they choose. In bargaining with the common employer, the unions will continue, as in the past, to represent the collective interests of all employees. To collect a fair share of the costs of this representation from workmen who hold opposing political views, the unions need only assure that the contribution demanded is confined to its lawful purpose. If they would collect from "free riders", the unions cannot force them into membership and then charge them for a *political* "ride" as well.

The Solicitor General has presented a brief which temporizes with vital rights at stake and leaves unheeded the truth that "constitutional rights are denied as well by the refusal of the . . . court to decide the question, as by erroneous decision of it." <sup>40</sup> He nonetheless has shown a commendable awareness of the importance of the constitutional question which is squarely presented for decision. In his November 3, 1960 application for additional time to submit a brief, he stated to this Court:

"This case involves questions of constitutional law of broad application. Both the Department of Labor and the Department of Commerce, as well as other agencies of the Government, are concerned with the questions involved. Receipt of the views of, and consultations with, these other agencies have been required, and further consultations and exchanges of views will be necessary, as well as additional time for the preparation and printing (through the Government Printing Office) of the brief."

In the Solicitor General's further application (granted on November 7) he stated:

<sup>40</sup> Mr. Justice Stone, in *Lawrence v. State Tax Commission*, 286 U.S. 253, at 282 (1932). His opinion continues (286 U.S. at 282):

"But the Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked."

"The issues involved in this proceeding have been the subject of meetings and consultation among various agencies of the Federal Government, and various views have been expressed as to the position which the United States should take as intervenor . . . Not only has it been and will it be necessary for several high officials of the Government to be consulted, but it has been and will be necessary to weigh the legal validity of the positions expressed in order to obtain a final position on behalf of the United States to be presented to this Court. We will not be able to obtain such a final position by Wednesday, November 9."

The appellant unions, in their responsive brief (p. 14) have chided the Solicitor General for irresolution and indecision:

"The due date of the brief then became November 9, the day after election day. The Department apparently found this time inadequate, and shortly before its expiration applied for an extension of time to November 25, stating that to prepare its brief consultation with certain high officials of the Government were required. Seemingly the time since the preceding June had been inadequate for that purpose."

We cannot join in the chiding; we can only regret that the Solicitor General, in the determination of basic constitutional issues, has preferred the advice of high officials of the Executive branch, rather than the teachings of Marshall, Holmes, Brandeis, Cardozo, Hughes and the other now departed and still living whose exertions in this citadel will be remembered in the history of Freedom. With hard earned wisdom, the Constitution establishes as its first and indispensable principle that this Court, and not the political branches, shall be entrusted with the ultimate and awesome responsibility for protecting the liberty of the individual and that above every act of government there broods the higher law of the Constitution, majestic and supreme.

As appellees' counsel freely conceded upon the first oral argument here, the concern of these six laborers is not primarily with the details of the relief to be granted. When individual belief and expression are the issue, the firm declaration of their sanctity means more than the particulars of the decree. It is not alone the money involved that has led these appellees to shoulder the burdens of this lawsuit for nearly eight years. Like Lilburne, they are aware that freedom can be whittled away almost imperceptibly, and that there can be no compromise with those who would imprison the minds and spirits of others. Despotism does not declare itself as such. The greatest tyranny has the smallest beginnings and, once power is conceded, liberty is lost. The indispensable condition of a free society—the right of each man to seek and support the truth as it is given him to find it—must be resolutely defended against every encroachment.

The decision below should be affirmed.

Respectfully submitted,

E. SMYTHE GAMBRELL

W. GLEN HARLAN

CHARLES A. MOYE, JR.

*Attorneys for Individual Appellees*

825 Citizens & Southern National  
Bank Building, Atlanta 3, Georgia

TERRY P. MCKENNA

GAMBRELL, HARLAN, RUSSELL, MOYE & RICHARDSON

Atlanta, Georgia

*Of Counsel*

December 29, 1960